IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

CHARLES L. WEDDING AND LOUIS I. AHLERING
v.
ROMANZA JEROME MEYLER.
No 125.

IN ERROR TO THE WARREN CIRCUIT COURT OF THE STATE OF KENTUCKY.

Brief for the Plaintiffs in Error.

STATEMENT.

Charles L. Wedding and Louis I. Ahlering brought suit, October 19, 1896, in the Warren circuit court of the state of Kentucky against Romanza Jerome Meyler upon a judgment recovered by them against him in the superior court of Vanderburgh county, Indiana, October 5, 1896, for two hundred dollars and costs.

The defendant answered denying that a true or complete copy of the record of the action referred to in the

petition in the superior court was filed and attested and certified according to the laws of congress or the laws of Kentucky, admitting that the sheriff of Vanderburgh county, Indiana, had, May 26, 1896, handed him a copy of the summons of the Indiana court directing him to appear in the action before the judge of the Indiana court on or before June 8, 1896, and answer the complaint of plaintiffs, but charging that the summons was handed defendant while both he and the sheriff were in Henderson county, Kentucky, "and out of the territorial limits of Indiana, or Vanderburgh county, and said sheriff had no authority to serve the same, and said service is void." The answer further denied that Meyler was in the state of Indiana "from the beginning of the action, May 27, 1896, till long after October 5, 1896, and never was present at a trial of any issue therein and never knew of any step or pleading or judgment or trial therein, and never authorized any one to try the same or plead therein." (Printed record, pp. 14-15.)

The plaintiffs replied in denial, averring that "when said summons was served upon defendant he was on board a steamboat, resting in the Ohio river and anchored at and attached to the shore and wharf at Evansville, Indiana, and was at the time within the limits of the state of Indiana, and subject to service of its process and to the jurisdiction of its courts." (Printed record, p. 17.)

The defendant filed a rejoinder admitting that "the summons named by plaintiffs was served upon him when he was aboard a steamboat," but denying that the boat was

anchored at or attached to the shore at the wharf at Evansville, Indiana, or that, when served, he was within the limits of Indiana, or subject to service of its process, or to the jurisdiction of the Indiana courts, or any court of Indiana. (Printed record, p. 19.)

On the trial the following interrogatory was propounded to the jury, and answered as follows:

> "When the summons in this case was served upon the defendant Meyler on the Ohio river, was said Meyler on the Indiana or Kentucky side of the low-water mark where it touches the Indiana shore?"
>
> "On the Kentucky side of the low-water mark."
>
> (Printed record, p. 20.)

June 11, 1897, the Warren circuit court rendered judgment in favor of plaintiffs against the defendant, upon the Indiana judgment for two hundred dollars, with six per cent. interest from October 5, 1896, and $8.40 costs of the Indiana court and also costs in the Kentucky court. (Printed record, p. 21.)

The defendant moved for a new trial (printed record, p. 22), which was overruled, and defendant appealed to the Kentucky court of appeals. (P. 23.)

The Kentucky court of appeals reversed the judgment of the Warren circuit court and remanded the cause with directions to the circuit court to render judgment on the verdict dismissing the action. (Printed record, p. 40.)

With the order reversing the judgment the court of appeals rendered an opinion, which, in accordance with rule

8, section 2, of this court, appears at page 40 of the printed record.

In accordance with the mandate, the Warren circuit court, June 15, 1901, after reciting the mandate of the court of appeals, rendered judgment as follows:

> "Therefore, in pursuance of said mandate of the court of appeals, the judgment of this court in plaintiffs' favor heretofore rendered herein upon the grounds that the judgment sued on by plaintiffs in this court from the superior court of Vanderburgh county, Indiana, rendered in plaintiffs' favor by said court on a summons served on defendant Romanza Jerome Meyler, on the Ohio river, said judgment being certified according to the act of congress, is entitled to full faith and credit in the courts of Kentucky—because, by virtue of the constitution and laws of Indiana, and the compact of the state of Virginia with Kentucky, approved by the congress of the United States December 18, 1789, and ratified by congress of the United States by its act, duly approved, the courts of the state of Indiana have concurrent jurisdiction with the state of Kentucky over the Ohio river for the service of civil and criminal process—is now ordered to be and is hereby set aside and held for naught; and, in lieu thereof, in further obedience to said mandate and opinion, it is adjudged that the service of summons from the superior court of Vanderburgh county, of Indiana, had upon defendant upon the Ohio river was invalid and conferred no jurisdiction upon said court to render judgment against defendant, as neither by the Virginia compact nor by the constitution and laws of Indiana were the

> courts of that state given jurisdiction concurrent with the courts of Kentucky for the service of process on the Ohio river; and it is, therefore, adjudged that defendant is entitled to judgment on the verdict of the jury, and plaintiffs' action be dismissed, and, further, that defendant recover of plaintiffs his costs in this court expended, whether accrued before or since the taking of the appeal herein." (Printed record, p. 5.)

From this judgment the plaintiffs prosecuted error to this court, the writ of error appearing in the printed record at page 53, the petition for a writ at page 55, and the assignment of errors at page 58.

The grounds for the decision of the court of appeals can be readily grasped by brief quotations from the opinion as it appears in the printed record or is to be found officially reported 107 Ky. 310.

The opinion says (record, p. 42):

> "The record shows that the superior court of Vanderburgh county that rendered the judgment had jurisdiction of the subject-matter of that action.
>
> "The only question, therefore, that arises on this appeal is, did that court acquire jurisdiction of the person of appellant by service of the summons on him while he was afloat on the river and south of low-water mark?
>
> "Section 11 of the compact of Virginia reads: 'Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the lim-

its of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.'

"It appears by the constitution of the state of Indiana, supra, that that state has exercised legislative jurisdiction over the river Ohio, and, therefore, is entitled to the full benefit of the act of Virginia, commonly called compact, supra. * * *

"The only authority under which Indiana can claim concurrent jurisdiction over the river Ohio is by reason of the compact with Virginia. (P. 46.)

"That part of the compact relating to the river Ohio and jurisdiction thereon is section 11, supra.

"The concurrent jurisdiction therein guaranteed to the states owning the northwestern shores of the river Ohio has always been considered by the state of Illinois to be legislative only, and that state has never, so far as we are informed, assumed to its courts jurisdiction beyond its territorial limits. The rights of the state of Illinois must be the same as of the state of Indiana.

"We are of the opinion clearly that concurrent jurisdiction as granted by the compact with Virginia meant only that the states should have legislative jurisdiction. This was done, as it seems to us, to insure to each state and to the citizens of the United States the free and unobstructed navigation of the river. In other words, concurrent jurisdiction was given and retained so that neither state,

against the wish of the other, or without the consent of the other, could authorize the construction of a bridge across the river, and so that each state could grant ferry privileges and wharfing privileges and regulate fishing therein, and such other rights common to both and necessary to be under a common supervision of both, to make the waters of the river Ohio a common, public, free and unobstructed highway for purposes of navigation.

"It is a universal rule that the jurisdiction of all states is limited by their territorial boundaries. To make an exception to this rule requires an express stipulation. It is against all rules and precedents of law to grant to another state jurisdiction over the territory of a state, and, if it be conceded that it can be done, it will never be by implication. If any grant be made, it should always be held to be the least power that the words of the grant covers.

"We realize that the courts of Indiana claim concurrent jurisdiction over the river Ohio, and that our opinion here is in conflict with that of the supreme court of Indiana; but we prefer to follow the opinion of the supreme court of the United States in this matter, especially when it agrees with our ideas on the subject. Louisville Bridge Co. v. City of Louisville, 81 Ky. 189.

"The constitution of Indiana, under which this concurrent jurisdiction is claimed, only gives or declares jurisdiction on the Ohio 'so far as said rivers (Ohio and Wabash) form the common boundary between this state and said states respectively.' The Wabash river forms the common boundary between the states of Indiana and Illinois, and, by the enabling acts of both states, concurrent juris-

diction is given over the Wabash. The Ohio river is not the common boundary between the state of Indiana and this state. The boundary line is low-water mark on the northwest, or Indiana, side. Indiana v. Kentucky, 136 U. S. 479. So that, if the letter of the constitution of Indiana be looked to alone, it does not declare that the courts of the state have jurisdiction, except on rivers forming the common boundaries thereof, which can not and does not include the river Ohio.

"We are, therefore, of the opinion that the superior court of the county of Vanderburgh, Indiana, did not acquire jurisdiction of the person of appellant by the service of summons on him while on the river and on this side of low-water mark, and by the verdict of the jury this was all the service ever had on appellant. The judgment sued on is therefore void, and judgment upon the verdict should have been rendered for appellant.

"For the reasons indicated, the judgment is reversed and cause remanded with directions to render judgment on the verdict dismissing the action, and for proceedings consistent herewith."

The opinion, as officially reported, Meyler v. Wedding, 107 Ky. 310, makes the following recitals on page 311:

"After the decision had been rendered in this case, the court granted specially to the state of Indiana the privilege of being heard in a petition for a rehearing and an oral argument upon same. And thereupon William L. Taylor, Attorney-General of Indiana, with Merrill Moores and Cassius C. Hadley, of counsel, filed a brief in which he insisted:

"1. That a reversal of the judgment of the Warren circuit court was a violation of the constitution of the United States in two respects: (a) It tended to impair the Virginia compact, which was a contract of the commonwealth of Kentucky, and thus violated article I of section 10, of the constitution of the United States as fully as might any act of legislation impair the obligation of that compact; and (b) it denied to the court and its proceedings the full faith and credit guaranteed by article IV, section 1."

The following recital appears at page 313:

"Upon the petitions for rehearing, the court granted an oral argument, which was heard by the full court, and thereupon the petition was overruled, Judge Hobson dissenting."

On page 325, at the conclusion of the principal opinion, appears the following:

"A separate concurring opinion was subsequently delivered by Judge Du Relle; and a dissenting opinion by Judge Hobson, in which Judge Burnam concurred. These opinions may be found at the end of this volume." (107 Ky. 685, 691-704.)

As stated by the Kentucky court of appeals, the question involved is whether the superior court of the county of Vanderburgh, Indiana, acquired jurisdiction of the person of the defendant in error "by service of summons on him while on the river and on this (the Kentucky) side of low-water mark."

The determination of this question involves several federal questions, which will be discussed later under that head.

THE ERRORS RELIED ON.

In the petition for allowance of the writ of error (printed record, p. 55) and in the assignment of errors in this court (printed record, p. 58) it is charged that, in the judgment of the Warren circuit court, entered under the specific order and direction of the court of appeals of the state of Kentucky, the circuit court erred:

1. In holding that the superior court of the county of Vanderburgh, Indiana, did not acquire jurisdiction of the person of defendant in error by the service of summons issued out of said court to the sheriff of Vanderburgh county, Indiana, on defendant in error, the defendant in error being at the time of such service afloat on the Ohio river to the south of low-water mark on the Indiana bank between the eastern and western boundary lines of Vanderburgh county, Indiana, and Henderson county, Kentucky, and that a judgment thereon which was recovered in said superior court by plaintiffs in error against the defendant in error is void and of no effect, thereby denying to and withholding from judicial proceedings of the state of Indiana the full faith and credit guaranteed in and by the constitution of the United States in each state to the public acts, records and judicial proceedings in every other state, contrary to article IV, section 1, of the constitution of the United States.

2. In holding as above, thereby denying to and withholding from the records and judicial proceedings of the state of Indiana, properly authenticated as provided by law, such faith and credit as they have by law and usage in the courts of the state of Indiana, in violation of section 905 of the revised statutes of the United States, and contrary to the provisions of article IV, section 1, of the constitution of the United States.

3. In holding as above, in a judgment in which there was drawn in question the validity of a statute of the congress of the United States, entitled "An act declaring the consent of congress that a new state be formed within the jurisdiction of the commonwealth of Virginia, and admitted into this Union, by the name of the State of Kentucky," approved February 4, 1791; and also the validity of an act of the general assembly of the commonwealth of Virginia, entitled "An act concerning the erection of the district of Kentucky into an independent state," approved December 18, 1789, referred to in said act of congress, and such decision and judgment was against the validity of said acts.

4. In holding as above, in a judgment in which there was drawn in question the validity of an authority exercised under each of said statutes, and such decision and judgment was against the validity of the authority exercised under said acts.

5. In holding as above, in a judgment in which the title, right, privilege and immunity of the state of Indiana to serve civil process on the Ohio river between Indiana

and Kentucky was specially set up and claimed by plaintiffs under the constitution of the United States and under the two statutes named above, and the decision and judgment is against the title, right, privilege and immunity of Indiana by its officers so to serve process on the Ohio river.

6. In holding as above, to the effect that Kentucky has exclusive jurisdiction over the Ohio river, where said river forms the boundary between Kentucky and Indiana, and thereby sustaining the validity of a statute of Kentucky entitled "An act to ratify and confirm the adjustment of the boundary line between this state and the state of Tennessee, according to the articles of stipulation entered into by the commissioners appointed by both states," approved February 11, 1820, wherein and whereby the entire boundary of Kentucky is defined and it is further provided that the sovereign power and jurisdiction of the commonwealth of Kentucky extends to and over the entire soil and waters within the limits described in the preceding section, except so far as she may have ceded jurisdiction to the United States for national purposes, which statute, as construed by said court, impairs the obligation of a contract entered into between the commonwealth of Virginia and the district of Kentucky, by and with the consent of congress, and accepted by the state of Kentucky, contained in an act of the general assembly of Virginia entitled "An act concerning the erection of the district of Kentucky into an independent state," approved December 18, 1789, and commonly known as the Virginia compact, contrary to the provisions of article I, section 10, of the constitution of the United States.

POINTS AND AUTHORITIES.

1. THE FEDERAL QUESTION.

The first four assignments of error state a federal question arising under the first clause of section 709, R. S. U. S.

The fifth, one arising under the third clause; and the sixth, one arising under the second clause.

a. As to assignments under the first and second clauses, it is sufficient that it appear that the validity of the statute was drawn in question and it is not necessary that any right be "specially set apart or claimed."

Columbia Water Power Co. v. Columbia Electric Street Ry. Co., 172 U. S. 475, 488;
Yazoo & Mississippi Valley Ry. Co. v. Adams, 180 U. S. 1, 14.

b. The federal questions were necessarily involved in this case, and, as the Kentucky court decided them, it is not material whether that court stated them as federal questions or not.

Green v. Van Buskirk, 5 Wall. 307, 314;
Green v. Van Buskirk, 7 Wall. 139, 145;
Carpenter v. Strange, 141 U. S. 87, 103;
Huntington v. Attrill, 146 U. S. 657, 683;
Mills v. Duryee, 7 Cranch 481, 484;
Christmas v. Russell, 5 Wall. 290, 302;
Cooper v. Reynolds, 10 Wall. 308, 316;
Maxwell v. Stewart, 22 Wall. 77, 81;
Insurance Company v. Harris, 97 U. S. 331, 336;

Hanley v. Donoghue, 116 U. S. 1;
Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292;
Atherton v. Atherton, 181 U. S. 155, 160;
Bell v. Bell, 181 U. S. 175;
Jacobs v. Marks, 182 U. S. 583, 587;
McCullough v. Virginia, 172 U. S. 102, 116;
Columbia Water Power Co. v. Columbia Electric Street Ry. Co., 172 U. S. 475, 487;
Douglas v. Kentucky, 168 U. S. 488, 502;
Walsh v. Columbus, H. V. & A. R. R. Co., 176 U. S. 469, 475;
Stearns v. Minnesota, 179 U. S. 223, 233;
Wilson v. Standefer, 184 U. S. 399, 411.

c. Where the state court has granted a petition for a rehearing which states a federal question, and has considered it, the question is saved.

Mallett v. North Carolina, 181 U. S. 589, 592.

d. Under the rule requiring opinions to be sent up with the record, it is a sufficient compliance with the words "specially set up and claimed" if it appear that the right was fully considered in the opinion and ruled against the plaintiff in error.

San José Land & Water Co. v. San José Ranch Co., 189 U. S. 177, 179.

e. A suit in the courts of one state upon a judgment of a sister state is in itself a claim for full faith and credit and it is set up by filing the complaint.

2. THE VIRGINIA COMPACT WITH KENTUCKY.

The compact is valid.

Handly's Lessee v. Anthony, 5 Wheat. 374, 385;
Green v. Biddle, 8 Wheat. 1, 86;
Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, 565-6;
Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 430;
Hawkins v. Barney, 5 Pet. 457, 465;
Charles River Bridge v. Warren Bridge, 11 Pet. 420, 582;
McKinney v. Carroll, 12 Pet. 66, 69;
Pollard v. Kibbe, 14 Pet. 353, 413;
Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 610;
Stearns v. Minnesota, 179 U. S. 223, 245;
United States v. New Orleans, 17 Fed. 483, 488;
Griswold v. Bragg, 48 Fed. 519, 522;
Poole v. Fleeger, 11 Pet. 185, 209;
Virginia v. Tennessee, 148 U. S. 503, 525;
Wharton v. Wise, 153 U. S. 155, 168;
New Jersey Bank v. Wilson, 7 Cranch. 164, 167;
Providence Bank v. Billings, 4 Pet. 514, 560;
Woodruff v. Trapnall, 10 How. 190, 207;
Wolff v. New Orleans, 103 U. S. 358, 365;
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 672;
Fowler v. Halbert, 4 Bibb (Ky.) 52, 54;
Church v. Chambers, 3 Dana (Ky.) 274, 278;

Arnold v. Shields, 5 Dana (Ky.) 18, 22; 30 Am. D. 669, 673;
McFall v. Commonwealth, 2 Met. (Ky.) 394, 398;
Louisville Bridge Co. v. Louisville, 81 Ky. 189, 194;
Garner's Case, 3 Gratt. 655, 674;
State v. Plants, 25 W. Va. 119; 52 Am. 211.

Compacts between the states, sanctioned by congress, are laws of the United States, and are also treaties made under the authority of the United States, and are protected as such by the constitution, article VI.

Green v. Biddle, 8 Wheat. 1, 86;
Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, 566;
South Carolina v. Georgia, 93 U. S. 4, 9;
Aitcheson v. Endless Chain Dredge, 40 Fed. 253, 256;
Ex parte Marsh, 57 Fed. 719, 723;
Stearns v. Minnesota, 179 U. S. 223, 245.

3. EXTRA-TERRITORIAL JURISDICTION.

There is a distinction between ownership and jurisdiction, and there may be jurisdiction without ownership.

Vattel, Law of Nations, Book I, §203, 295;
Garner's Case, 3 Gratt. 655, 708;
Devoe Manufacturing Co., 108 U. S. 401, 411, 412;
The Norma, 32 Fed. 411, 413;
Falmouth v. Watson, 5 Bush (Ky.) 660;
Lutz v. Crawfordsville, 109 Ind. 466;

Emerich v. Indianapolis, 118 Ind. 279;
Kaufle v. Delaney, 25 W. Va. 410;
Flack v. Fry, 32 W. Va. 364;
Neal v. Commonwealth, 17 S. & R. 67;
Coldwater v. Tucker, 36 Mich. 474; 24 Am. 601;
Gould v. Rochester, 105 N. Y. 46;
Van Hook v. Selma, 70 Ala. 361; 45 Am. 85;
Chicago Packing Co. v. Chicago, 88 Ill. 221; 30 Am. 545;
Albia v. O'Harra, 64 Iowa 297;
State v. Franklin, 40 Kan. 410;
Hagood v. Hutton, 33 Mo. 244.

4. CONTEMPORANEOUS CONSTRUCTION, USAGE AND ACQUIESCENCE.

Stuart v. Laird, 1 Cranch 299, 309;
Prigg v. Pennsylvania, 16 Pet. 539, 621;
Cooley v. Board of Wardens, 12 How. 299, 315;
Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 733;
The Laura, 114 U. S. 411, 416;
Auffmordt v. Hedden, 137 U. S. 310, 329;
Schell's Executors v. Fauché, 138 U. S. 262-572;
Field v. Clark, 143 U. S. 649, 691;
McPherson v. Blacker, 146 U. S. 1, 27;
Fairbank v. United States, 181 U. S. 283, 309;
Carlisle v. State, 32 Ind. 55;
Sherlock v. Alling, 44 Ind. 184;
Dugan v. State, 125 Ind. 130; 9 L. R. A. 321;

Welsh v. State, 126 Ind. 71; 9 L. R. A. 664;
Memphis & Cincinnati Packet Co. v. Pikey, 142 Ind. 304;
Church v. Chambers, 3 Dana (Ky.) 274, 278;
Arnold v. Shields, 5 Dana (Ky.) 18, 22; 30 Am. D. 669, 673;
McFall v. Commonwealth, 2 Met. (Ky.) 394, 398;
Garner's Case, 3 Gratt. 655, 676, 736;
State v. Plants, 25 W. Va. 119; 52 Am. 211;
State v. Faudré (W. Va. Nov. 14, 1903).

The federal courts of Ohio and Indiana have always exercised admiralty jurisdiction over the Ohio river.

McGinnis v. The Pontiac, 5 McLean 359; 16 Fed. Cas. 8801;
Seven Coal Barges, 2 Biss. 297; 21 Fed. Cas. 12677;
The Lewellen, 4 Biss. 156; 16 Fed. Cas. 8, 307;
Longstreet v. Steamboat R. R. Springer, 4 Fed. 671;
The Liberty No. 4, 7 Fed. 226;
The Guiding Star, 9 Fed. 521;
The Guiding Star, 18 Fed. 263;
The Cherokee, 15 Fed. 119;
The Thomas Sherlock, 22 Fed. 253;
Baumgartner v. The W. B. Cole, 49 Fed. 587;
Memphis & Cin. Packet Co. v. Overman Carriage Co., 93 Fed. 246;
The City of Clarksville, 94 Fed. 201;
Bennitt v. Guiding Star, 53 Fed. 936;
Wilbour v. Hegler et al., 62 Fed. 407;
Kineon v. The New Mary Houston, 69 Fed. 362.

5. WHAT IS CONCURRENT JURISDICTION?

Definition of territorial concurrent jurisdiction.

12 Am. & Eng. Ency. of Law (1st ed.), 296;
Rapalje & Lawrence's Law Dictionary;
Bouvier's Law Dictionary;
Rorer Interstate Law (2d ed.), p. 438;
Wiggins Ferry Co. v. Reddig, 24 Ill. App. 260, 265;
Sanders v. New Orleans & St. Louis Anchor Line, 97 Mo. 26, 30;
Swearingen v. Steamboat Lynx, 13 Mo. 519;
State v. Metcalf, 65 Mo. App. 681, 687;
Cooley v. Golden, 52 Mo. App. 229;
State v. Mullen, 35 Iowa 199, 201;
Buck v. Ellenbolt, 84 Iowa 394, 396; 15 L. R. A. 187, 189;
Opsahl v. Judd, 30 Minn. 126, 129;
State v. George, 60 Minn. 503, 505;
State v. Cameron, 2 Pinney (Wis.) 490, 495;
J. S. Keator Lumber Co. v. St. Croix Boom Corporation, 72 Wis. 62, 95; 7 Am. St. 837, 858;
Roberts v. Fullerton (Wis. 1903), 93 N. W. 1111;
State v. Davis, 25 N. J. L. 386;
Commonwealth v. Frazee, 2 Phila. 191, 193;
Neal v. Commonwealth, 17 S. & R. 67;
Commonwealth v. Shaw, 22 Pa. C. C. 414; 8 Pa. Dist. 509;
Aitcheson v. Endless Chain Dredge, 40 Fed. 253, 255;
Gardner's Institutes, 209, 210.

1. THE FEDERAL QUESTIONS.

It is charged as error that in denying the validity of the authority of the sheriff of Vanderburgh county to serve process from a court of general jurisdiction upon a person afloat on the Ohio river opposite Vanderburgh county to the south of low-water mark on the Indiana bank; the Kentucky court

1. Withheld from plaintiffs in error the full faith and credit guaranteed by article IV, section 1, of the constitution, in each state to the public acts, records and judicial proceedings of every other state.

2. Withheld from the plaintiffs in error as to the properly authenticated records of judicial proceedings of an Indiana court tendered by them such faith and credit as they have by law and usage in the courts of Indiana, which is guaranteed by article IV, section 1, of the constitution and section 905 of the revised statutes of the United States.

3. Denied the validity of the act of congress under which Kentucky was admitted to the union, and of the Virginia compact, which has been held by this court to be "a law of the union."

4. Denied the validity of an authority exercised by an officer of Indiana under the same acts.

5. Denied the title, right, privilege and immunity of the state of Indiana and of plaintiffs in error to cause process to be served on the Ohio river, as conferred by said acts and guaranteed by article IV, section 1, of the constitution.

6. Sustained the validity of a Kentucky statute which impairs the obligation of the Virginia compact in violation of article I, section 10, of the constitution.

Under the first two assignments of error, the proposition is that a suit where was drawn in question the validity of the authority by which the sheriff of Vanderburgh county, Indiana, had served a summons upon a person afloat on the Ohio river under the constitution of the United States and the statute (R. S. U. S., §905) and under the act of congress admitting Kentucky and the Virginia compact a final judgment was rendered in which the decision was against the validity of the authority exercised and which impaired the constitutional and statutory guarantee of full faith and credit to the properly authenticated records and judicial proceedings of an Indiana court.

The third assignment is based upon the proposition that, in the same suit, the decision was against the validity of the act admitting Kentucky and the Virginia compact.

The fourth assignment is based on the proposition that, in the same suit, the decision was against the validity of the authority exercised under these acts.

The fifth assignment is based on the proposition that the decision was against the right to serve process claimed under the same article of the constitution and the two acts named.

The sixth assignment is based on the proposition that the decision sustained the validity of a Kentucky statute of 1820 defining the boundary and jurisdiction of the state which was drawn in question and which impaired the obligation of the Virginia compact.

The first four assignments are under the first clause of section 709 of the revised statutes, the fifth is under the third clause and the sixth under the second.

As to the assignments under the first and second clauses, all that is required is that the validity of the statute or authority shall have been drawn in question. Section 709 does not, in such cases, require anything to be "specially set apart or claimed."

In Columbia Water Power Company v. Columbia Electric Street Railway Company, 172 U. S. 475, 488, this court say:

> "Where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. Miller v. Nicholls, 4 Wheat. 311; Willson v. Blackbird Creek Marsh Co., 2 Pet. 245; Satterlee v. Matthewson, 2 Pet. 380, 410; Fisher's Lessee v. Cockerell, 5 Pet. 248; Crowell v. Randell, 10 Pet. 368; Harris v. Dennie, 3 Pet. 292; Farney v. Towle, 1 Black 350; Hoyt v. Shelden, 1 Black 518; Railroad Co. v. Rock, 4 Wall. 177; Furman v. Nichol, 8 Wall. 44; Kaukauna Co. v. Green Bay, etc., Canal Co., 142 U. S. 254.

> "The case under consideration falls within the second class, and, as it appears from the record and the opinion of the court, which may be examined for that purpose (Kreiger v. Shelby Railroad, 125 U. S. 39), that the question was presented and decided, that the act of 1892, affirming the validity of defendant's contract with the board of directors of the state penitentiary did not impair the obligation of plaintiff's contract, evidenced by the act of 1887, because that act properly construed conveyed no exclusive rights, we think the federal question sufficiently appears."

In Yazoo & Mississippi Valley Ry. Co. v. Adams, 180 U. S. 1, 14, this court say:

> "In short, the case is one of those frequently arising under the second clause of Rev. Stat., section 709, in which the validity of a state statute under the constitution of the United States is necessarily drawn in question, and the decision of the state court being in favor of its validity, this court will take jurisdiction, though the federal question be not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section where a right, title, privilege or immunity is claimed, that the federal question must be specially set up. The cases are collected in Columbia Water Power Company v. Columbia Electric Street Railway Company, 172 U. S. 475, 488. Thus, in Willson v. Blackbird

Creek Marsh Co., 2 Pet. 245, the record did not show that the constitutionality of an act of a state legislature was drawn in question; 'but,' said the Chief Justice, 'we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court.' So, in Satterlee v. Matthewson, 2 Pet. 380, it was said that if it sufficiently appear from the record itself that the repugnancy of the statute of a state to the constitution of the United States was drawn in question, this court has jurisdiction, though the record does not in terms declare that this question was raised. See, also, Crowell v. Randell, 10 Pet. 368; Furman v. Nichol, 8 Wall. 44; Chicago Life Ins. Co. v. Needles, 113 U. S. 574; Eureka Lake, etc., Co. v. Yuba County, 116 U. S. 410; Kaukauna Co. v. Green Bay & Mississippi Canal, 142 U. S. 254. And the fact that the supreme court of the state did not expressly refer to the contract clause of the constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision. As was said by Chief Justice Waite in Chapman v. Goodnow, 123 U. S. 540, 548: 'If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the revised statutes, as if it had been specifically referred to, and the right directly refused.'

"The decision of the supreme court that the exemption in the Mobile & Northwestern Railroad Company's charter of 1870 was void under the constitution of 1869 was practically a decision that the contract of the state was beyond the power of the legislature and void, and hence there was no contract to be impaired. But, conceding this contract to have been valid, another distinct question arose, whether that contract enured to the benefit of the plaintiffs in error by the successive consolidations — in other words, whether, as to the plaintiffs in error, there was any contract ever existing which the taxing legislation of Mississippi could impair. Both these questions were ruled against the railroads; and while the contract clause of the federal constitution was not discussed, the case turned upon the existence of such a contract, and no question seems to have been made that, if there had been a contract, it was impaired by the taxing legislation of 1892. As we have often held, that where an impairment of a contract by state legislation is charged, the existence or nonexistence of the contract is a federal question, it is impossible to escape the conclusion that the foundation of the whole case was, whether there was really a contract which had been impaired, and that this was necessary to the determination of the case. As already stated, this was a federal question, and the fact that the supreme court did not in terms discuss the contract clause of the constitution does not oust our jurisdiction."

The opinion of the Kentucky court of appeals under rule 8, section 2, of this court is a part of the record (printed record, p. 40). It shows conclusively that the only question before the court was the validity of the authority exercised by the Indiana sheriff in serving summons on the defendant in error while he was afloat on the Ohio river. The same appears from the concurring and dissenting opinions of the Kentucky judges as reported, Meyler v. Wedding, 107 Ky. 685. The same is shown on the face of the judgment of the Warren circuit court complained of here. (Printed record, p. 51.) The issues raised by the pleadings and the verdict of the jury (p. 20) show that this was the only possible question in the case.

The opinion of the Kentucky court of appeals does not in so many words discuss the question of whether the decision denies to the record of the Indiana judgment such faith and credit as it has by law or usage in the courts of Indiana, but it holds the judgment void, notwithstanding the court refers to decisions of the supreme court of Indiana (quoted from at length, pp. 699, 700, in the opinion of the two dissenting judges) which decide that the authority of such service of process on the Ohio river is recognized by the Indiana courts.

The Kentucky court did not in terms deny the validity of the act by which Kentucky was admitted, or even mention it, though it discusses at length the Virginia compact of 1789 (which this court has held became a part of the act which admitted Kentucky), and, by construction, completely nullified the grant of concurrent jurisdiction con-

tained in the compact. If the court could not hold the act invalid, after this court has held it binding, it certainly had no power to nullify it by construction.

The Kentucky court did not refer to the Kentucky statute of 1820, which defined the boundary of Kentucky as extending to low-water mark on the northwest bank, and provided that "the sovereign power and jurisdiction of the commonwealth of Kentucky extends to and over the entire soil and waters within the limits described in the preceding section, except so far as she may have ceded jurisdiction to the United States for national purposes." It was not necessary to construe "sovereign power and jurisdiction" as exclusive, if the court could construe the concurrent jurisdiction granted to "the states which may possess the opposite shores of the said river" as meaningless.

Nor does it appear that the court considered the Kentucky act of 1810, to which Mr. Justice Harlan refers in Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 611, which reads:

> "Whereas, doubts are suggested whether the counties calling for the river Ohio as the boundary line extend to the state line on the northwest side of said river, or whether the margin of the southeast side is the limit of the counties; to explain which
>
> "Be it enacted by the General Assembly, That each county of this commonwealth, calling for the river Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands therefore shall be within the

> respective counties holding the mainland opposite thereto, within this state, and the several county tribunals shall hold jurisdiction accordingly."
>
> Kentucky Sess. Laws, 1810, p. 100.

In a case where it did not affirmatively appear that the defendant in a New York court relying upon an Illinois judgment claimed full faith and credit for the proceedings of the Illinois court, this court, in overruling a motion to dismiss, say:

> "We do not here decide that the proceedings in the state of Illinois have there the effect which the plaintiff claims for them; because that must remain to be decided after argument on the merits of the case. But we hold that the effect which these proceedings have there, by the law and usage of that state was a question necessarily decided by the New York courts, and that it was decided against this claim set up by plaintiff in error under the constitutional provision and statute referred to, and the case is therefore properly here for review."
>
> Green v. Van Buskirk, 5 Wall. 305, 314;
> See Green v. Van Buskirk, 7 Wall. 139, 145.

In Carpenter v. Strange, 141 U. S. 87, plaintiff in error brought suit in Tennessee upon a New York judgment. The validity and effect of the New York judgment being questioned in the Tennessee courts, the case was brought to this court on error to the supreme court of Tennessee. In this case, the court say on page 101:

> "The judgment or decree of the New York court was entitled to the same credit and effect in the

state of Tennessee that it had in the state of New York, where it was rendered. Did it receive it? * * * By the New York judgment Mrs. Carpenter's prayer that the devise should be freed from the condition and Mrs. Strange's that Mrs. Carpenter should be required to accept the devise with the condition, were both in legal effect denied. And by the terms of the judgment the plaintiff recovered the amount of the trust money. This she could not have done if she had elected to take under the will, which would have subjected her to the operation of the condition. The judgment was a judgment de bonis testatoris, and it became Mrs. Strange's duty as executrix to apply the property of the testator wherever situated to the payment of the judgment.

"There is no doubt whatever that a federal question is presented by the record, but it is said that, conceding this, yet the supreme court of Tennessee also decided the case upon a question of general law sufficiently broad to support the judgment even if the federal question was decided erroneously. And the ground thus referred to is that the court held that Mrs. Carpenter could not recover as a creditor of the estate of her father because she had elected to claim under his will as devisee. But that question was not open to the supreme court to decide, if it gave full faith and credit to the judicial proceedings of a sister state, since it had been already passed upon and determined by the New York court, whose judgment was put in evidence." (p. 103.)

In Huntington v. Attrill, 146 U. S. 657, 683, this court say:

> "If a suit to enforce a judgment rendered in one state, and which has not changed the essential nature of the liability, is brought in the courts of another state, this court, in order to determine, on writ of error, whether the highest court of the latter state has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense. The case in this regard is analogous to one arising under the clause of the constitution which forbids a state to pass any law impairing the obligation of contracts, in which, if the highest court of a state decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. New Orleans Waterworks v. Louisiana Sugar Co., 125 U. S. 18, 38. So if the state court, in an action to enforce the original liability under the law of another state, passes upon the nature of that liability and nothing else, this court can not review its decision; but if the state court declines to give full faith and credit to a judgment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to

that judgment, must decide for itself the nature of the original liability.

"Whether the court of appeals of Maryland gave full faith and credit to the judgment recovered by this plaintiff in New York depends upon the true construction of the provisions of the constitution and of the act of congress upon that subject. * * *

"Nor do these provisions put the judgment of other states upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the state in which they are sued on, pleaded, or offered in evidence. McElmoyle v. Cohen, 13 Pet. 312, 325. But when duly pleaded and proved in a court of that state, they have the effect of being not merely prima facie evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect in this respect which they had in the state in which they were rendered denies to the party a right secured to him by the constitution and laws of the United States. * * *

"The court of appeals of Maryland, therefore, in deciding this case against the plaintiff upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit and effect to which it was entitled under the constitution and laws of the United States."

See, also—

Mills v. Duryee, 7 Cranch 481, 484;
Christmas v. Russell, 5 Wall. 290, 302;

Cooper v. Reynolds, 10 Wall. 308, 316;
Maxwell v. Stewart, 22 Wall. 77, 81;
Insurance Company v. Harris, 97 U. S. 331, 336;
Hanley v. Donoghue, 116 U. S. 1;
Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292;
Atherton v. Atherton, 181 U. S. 155, 160;
Bell v. Bell, 181 U. S. 175;
Jacobs v. Marks, 182 U. S. 583, 587.

In McCullough v. Virginia, 172 U. S. 102, 116, this court say:

> "It is true that the court of appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly held by this court that, in reviewing the judgment of the courts of a state, we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision. * * *
>
> "Could it be said that the silence of the state court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a

state court to determine our jurisdiction. Such, certainly, has not been the understanding, and such, certainly, would seem to set at naught the purpose of the federal constitution to prevent a state from nullifying by its legislation a contract, which it has made or authorized to be made. In Hickie v. Starke, 1 Pet. 94, 98, Chief Justice Marshall, delivering the opinion of the court, said: 'In the construction of that section (the twenty-fifth) the court has never required that the treaty or act of congress, under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially or spread in the record. But it has always been deemed essential to the exercise of jurisdiction in such a case that the record should show a complete title under the treaty or act of congress, and that the judgment of the court is in violation of that treaty or act.'

"And in Willson v. Blackbird Creek Marsh Company, 2 Pet. 245, 250, the same chief justice also said: 'But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. * * * This court has repeatedly decided in favor of its jurisdiction in such a case. Martin v. Hunter's Lessee, 1 Wheat. 304; Miller v. Nichols, 4 Wheat. 311; and Williams v. Norris, 12 Wheat. 117, are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record that the constitution or a law of the United States was drawn in question. It

is sufficient to bring the case within the provisions of the twenty-fifth section of the judicial act, if the record shows that the constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law.'

"In Satterlee v. Matthewson, 2 Pet. 380, 410, Mr. Justice Washington observed: 'If it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of the state to any part of that constitution was drawn into question.'

"In Bridge Proprietors v. Hoboken Company, 1 Wall. 116, 143, an act passed by the state in 1860 was claimed to be in violation of a contract created by an act of 1790, and it was said: 'Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of congress, or part of the constitution supposed to be infringed by the state law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is that the court must be able to see clearly, from the whole record that a certain provision of the constitution or act of congress was

relied on, by the party who brings the writ of error and that the right thus claimed by him was denied. * * * It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the state court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases.' * * *

"In Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486, 492, 493, Mr. Justice Jackson, reviewing prior decisions, said: 'It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract, in cases like the present, is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair its contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.' * * *

"The court of appeals did not specifically refer to these statutes, but, by declaring that the contract

> provided for in the act of 1871 was void, it did give full force and effect to them, as well as to the general revenue law of the state. Now, it is one of the duties cast upon this court by the constitution and laws of the United States to inquire whether a state has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision."

In Columbia Water Power Company v. Columbia Electric Street Railway Company, 172 U. S. 474, 487, this court said:

> "While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such construction is no less a federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very

recent case of McCullough v. Virginia, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question."

In Douglas v. Kentucky, 168 U. S. 488, 502, this court said:

"This court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment."

McCullough v. Virginia, 172 U. S. 102, 109;
Walsh v. Columbus, H. V. & A. R. R. Co., 176 U. S. 469;
Stearns v. Minnesota, 179 U. S. 223, 233;
Wilson v. Standefer, 184 U. S. 399, 411.

As before stated, it appears from the official report of this case, Meyler v. Wedding, 107 Ky. 310, 311, that "after the decision had been rendered in this case, the court granted specially to the state of Indiana the privilege of being heard in a petition for a rehearing and an oral argument upon the same. And thereupon William L. Taylor, Attorney-General of Indiana, with Merrill Moores and Cassius C. Hadley of counsel, filed a brief in which he insisted that a reversal of the judgment of the Warren circuit court was a violation of the constitution of the United States in two respects: (a) It tended to impair the Virginia compact,

which was a contract of the commonwealth of Kentucky, and thus violated article I, section 10, of the constitution of the United States as fully as might any act of legislation impair the obligation of that contract; and (b) it denied to the Indiana court and its proceedings the full faith and credit guaranteed by article IV, section 1. Upon the petitions for rehearing the court granted an oral argument which was heard by the full court, and thereupon the petition was overruled; Judge Hobson dissenting."

Even if the federal questions had not been presented, argued, and in effect decided by the Kentucky court at the original hearing, this procedure brings the case within the rule laid down in Mallett v. North Carolina, 181 U. S. 589, 592:

> "We are of opinion that questions arising under the constitution and laws of the United States were presented in the supreme court of the state, and were by that court considered and decided against the party invoking their protection.
>
> "It is true, as we learn from the first opinion filed by the supreme court, that such federal questions were not considered by that court, or, at all events, were not treated as federal questions, but as questions arising under state laws. But the record discloses that, after that opinion had been filed but before it had been certified down, the defendants filed a petition for reargument, and presented the federal questions on which they rely. The supreme court entertained the petition, and proceeded to discuss and decide the federal questions. In support of the motion to dismiss, numerous decisions

of this court are cited to the effect that it is too late to raise a federal question by a petition for a rehearing in the supreme court of a state after that court has pronounced its final decision. Loeber v. Schroeder, 149 U. S. 580; Sayward v. Denny, 158 U. S. 180; Pim v. St. Louis, 165 U. S. 273.

"But those were cases in which the supreme court of the state refused the petition for a rehearing, and dismissed the petition without passing upon the federal questions. In the present case, as already stated the supreme court of North Carolina did not refuse to consider the federal questions raised in the petition, but disposed of them in an opinion found in this record. State v. Mallett, 125 N. C. 718. Had that court declined to pass upon the federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action."

The original opinion of the Kentucky court of appeals was rendered November 24, 1899. (Printed record, p. 40.) The mandate of that court to the Warren circuit court bears that date, but was not issued until December 26, 1900. (Printed record, p. 40.)

The separate concurring and dissenting opinions were not delivered at the time of the original opinion (107 Ky. 685), but December 22, 1900. (60 S. W. 20.) The dissenting opinion shows that they were filed after the reargument of the case. (107 Ky. 693.)

That the same question was considered as in the original opinion and that it was a federal question appears

from the context. In the concurring opinion, Judge Du Relle says (107 Ky. 685):

> "The question presented is whether process from a court of Indiana may be served upon the Ohio river south of low-water mark. The settlement of this question depends upon the construction given to the peculiar phraseology of section 11 of the compact between Kentucky and Virginia, 13 Hen. St. Va. 19. * * *
>
> "This can not be a grant to any state upon the northern shore of the river, for no such state existed. There was no being in esse to take such a gift. But if it be the proper construction that, by this provision, a trust was created for the benefit of a state thereafter to be created upon the northern shore, and by this language Kentucky was made trustee to hold the title until such creation, it may be that the contention of appellees may be sustained.
>
> "But, in construing this section it should be borne in mind that it was one part only of the legislation and action whereby Virginia disposed of her imperial domain. And it must be construed as being in pari materia with the resolution of the Virginia legislature relating to the cession of the Northwest Territory, the deed of cession, the ordinance of 1787 by congress accepting the grant, the amendment of the deed of cession at the request of congress, and the acts of congress admitting Kentucky, Indiana, Illinois and Ohio into the Union as states. * * * By laws enacted in 1791-92, Kentucky was admitted into the Union as a state, according to the provisions of the compact."

In the dissenting opinion of Judge Hobson, in which Judge Burnam concurred, he says (p. 691-704):

> "The question involved in this case is whether the process from the courts of Indiana may lawfully be served by her officers on the Ohio river." (P. 691.) * * *
>
> "The two states have concurrent jurisdiction on the river, and neither can by its laws impair or control the jurisdiction of the other. The courts of the state first acquiring jurisdiction of the cause and the parties will retain it, and the courts of the other state will not interfere.
>
> "No question of conflict of law arises in this case. The only question is whether the judgment of the Indiana court is void for want of jurisdiction because the process on which it is based was served on the Ohio river.
>
> "For the reasons indicated, it seems to me the court below properly held the judgment valid, and that the construction now adopted by this court for the first time, over a century after the act was passed, denies it fair effect, and is unwarranted by the authorities." (P. 704.)

In addition to the assignments of error based upon the denial of the validity of the authority exercised by an Indiana officer under the constitution and laws of the United States, it is assigned that the decision denied the right of such officer to serve process. This assignment is under the third clause of section 709 of the revised statutes.

There can be no doubt on the record that this question was decided by the Kentucky court. Since the rules of

this court were so changed as to require a copy of the opinion to be certified to this court as a part of the record, a more liberal practice has prevailed in construing the words "specially set up or claimed."

In San José Land and Water Company v. San José Ranch Company, 189 U. S. 177, 179, this court says:

> "While the right under the act of 1887, thus considered, was not originally set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument; and under the rule of this court, requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed' that it was fully considered in the opinion of the court and ruled against the plaintiff in error. Murdock v. Memphis, 20 Wall. 590, 633; Gross v. United States Mortgage Co., 108 U. S. 477; Philadelphia Fire Association v. New York, 119 U. S. 110, 115; Egan v. Hart, 165 U. S. 188; Sayward v. Denny, 158 U. S. 180, 184; Mallett v. North Carolina, 181 U. S. 589. These must be considered as leading under our change of rule, to a different result from that reached in some prior cases, Williams v. Norris, 12 Wheat. 117; Rector v. Ashley, 6 Wall. 142, and Gibson v. Chouteau, 8 Wall. 314, in which we held that the opinion of the state court could not be resorted to for the purpose of showing that a question of federal cognizance was decided."

In this case, the exhibiting by plaintiffs with the original petition in the Warren circuit court of the record of the proceedings and judgment of the superior court of the county of Vanderburgh, properly authenticated under the act of congress, as shown by the record (pp. 8-13), was in itself an act by which plaintiffs specially set up and claimed for themselves, and for the courts of Indiana and the public acts of its officers the full faith and credit guaranteed in the Kentucky courts by the constitution and laws of the United States. It would amount in many cases to a denial of justice, if this court were to hold that one who asserted a right given him by the federal constitution must in every case accompany his assertion of the right by a threat, in order to be entitled to appeal to the final guardian of constitutional rights for redress in case his claim was denied him.

A suit in the courts of one state upon a judgment of a sister state is in itself a claim for full faith and credit. It does not need a federal label to inform any court that to refuse to the judgment the faith and credit given it in the state where it was rendered is to deny to the plaintiff a right protected by the federal constitution. In such cases the right is claimed when the suit is brought; but no federal question exists until the right is denied. It will not be presumed that any court will violate the constitution, and to hold that the federal questions must be announced in advance would be to demand that a suitor point out a federal question before there was one in existence. Especially would this be true in a case like the one under con-

sideration, where the trial court promptly accorded the constitutional right and no federal question arose until its judgment was reversed. If the bringing of the suit on the judgment was not a claim of a constitutional right, then the plaintiffs had no opportunity to assert one; for when the right was denied, the only opportunity left them to assert it was by the petition for a rehearing and a reargument, which was promptly filed based upon grounds which plainly assert the federal question, and was granted by the court, with the result that, after a reargument, the majority of the court adhered to the original opinion.

2. THE VIRGINIA COMPACT WITH KENTUCKY.

From the place where it leaves Pennsylvania to its mouth, the Ohio river is a boundary between states. From where it crosses the Pennsylvania line to the mouth of the Big Sandy, it is the boundary between Ohio and West Virginia. From there to the mouth of the Miami it is the boundary between Ohio and Kentucky; and from the mouth of the Miami to that of the Wabash it is the boundary between Indiana and Kentucky, and from there to its mouth, between Illinois and Kentucky.

From the place where it leaves Pennsylvania to its mouth, the Ohio river runs through territory which originally belonged to Virginia. The land to the south of the river was either a part of Virginia or of the district of Kentucky, in Virginia, and that to the north of the Ohio was, under the authority of a Virginia statute enacted December 20, 1783 (11 Hen. St. at Large, Va., 326),

ceded by Virginia to the United States by a deed executed March 1, 1784. (11 Hen. St. at Large, Va., 571.)

July 13, 1787, the congress of the United States, under the articles of confederation, enacted an ordinance for the government of the ceded territory. (U. S. R. S. 1878, 2d ed., p. 13; 1 Comp. St. U. S. 1901, p. lvii.)

Neither the statute nor the deed of cession of Virginia, nor the ordinance of 1787, nor any subsequent statute of Virginia, nor any act of congress, made any reference to the matter of jurisdiction over the Ohio river, until the act of Virginia of December 18, 1789, commonly called the Virginia compact, was enacted.

After prolonged disagreement between that part of Virginia now known as Kentucky and the mother state, terms were agreed upon for a separation, pursuant to which Kentucky was admitted to the Union as an independent state. December 18, 1789, the general assembly of Virginia enacted a law granting to the district of Kentucky the right to become independent, upon the acceptance, by representatives of the inhabitants of Kentucky to be elected for that purpose, of the terms of the enabling act, which provided that Kentucky might "be erected into an independent state on the terms and conditions following." Eight conditions are stated, but one of which, the seventh, is material to this controversy.

The seventh condition (section 11 of the act) is as follows:

> "Seventh. That the use and navigation of the river Ohio, so far as the territory of the proposed

state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

(13 Hen. Va. St. at Large, 19; Ky. Stat. 1899, p. 43.)

The Kentucky convention provided for by this act having met and accepted the terms of the compact, and petitioned congress to admit Kentucky as a new state, the first congress of the United States, on February 4, 1791, passed the following act admitting Kentucky to the Union:

"An act declaring the consent of congress that a new state be formed within the jurisdiction of the commonwealth of Virginia, and admitted into this Union, by the name of the state of Kentucky.

"Whereas, The Legislature of the Commonwealth of Virginia, by an act entitled 'an act concerning the erection of the district of Kentucky into an independent state,' passed the eighteenth day of December, one thousand seven hundred and eighty-nine, have consented that the district of Kentucky, within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state; and, whereas, a convention of delegates, chosen by the people of the said district of Kentucky, have petitioned congress to

consent that on the first day of June, one thousand seven hundred and ninety-two, the said district should be formed into a new state and received into the Union by the name of the 'State of Kentucky.'

"Be it enacted by the Senate and House of Representatives of the United States of America, in congress assembled, and it is hereby enacted and declared, That the Congress doth consent that the said district of Kentucky, within the jurisdiction of the commonwealth of Virginia, and according to its actual boundaries on the eighteenth day of December, one thousand seven hundred and eighty-nine, shall, upon the first day of June, one thousand seven hundred and ninety-two, be formed into a new state, separate from and independent of the said commonwealth of Virginia.

"§2. And be it further enacted and declared, That upon the aforesaid first day of June, one thousand seven hundred and ninety-two, the said new state, by the name and style of the State of Kentucky, shall be received and admitted into this Union as a new and entire member of the United States of America. Approved February 4, 1791."

Upon the admission of Kentucky to the United States, a constitution was adopted for that state, which, by article 8, section 7, provided:

"The compact with the state of Virginia, subject to such alterations as may be made therein, agreeably to the mode prescribed by the said compact, shall be considered as a part of this constitution." Ky. St. 1899, p. 52.

In 1799, a second constitution was adopted by Kentucky, article 6, section 9, of which is identical with the section quoted from the first constitution. Ky. St. 1899, p. 62.

In 1850, a third constitution was adopted by Kentucky, embodying the same provision as article 8, section 9. Ky. St. 1899, p. 78.

Until the adoption of the present constitution of Kentucky in 1891, when it was omitted, the compact with Virginia was thus formally recognized by the constitution as a part of the fundamental law of the state.

The validity of this compact has been repeatedly sustained by this court. In the case of Handly's Lessee v. Anthony, 5 Wheat. 374, 385, this court first speak of the compact, saying:

> "The compact with Virginia, under which Kentucky became a state, stipulates that the navigation of and jurisdiction over the river shall be concurrent between the new states and the states which may possess the opposite shores of the said river."

In Green v. Biddle, 8 Wheat. 1, 86, this court recognize the compact as valid and binding upon the parties and hold that it is protected by the constitution and that to deny the obligation of the terms and conditions of the compact is to deny the validity of the act of congress by which Kentucky was admitted. This court say, on page 86:

> "The compact was entered into between Virginia and the people of Kentucky, upon the express condition that the general government should, prior to

a certain day, assent to the erection of the district of Kentucky into an independent state, and agree that the proposed state should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention of that district assembled, under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said district should become a separate state on the first of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the President of the United States to congress, a report was made by a committee to whom the subject was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a state upon certain terms and conditions, and the acceptance by Kentucky upon the terms and conditions so prescribed; and, on the 4th of February, 1791, congress passed an act which, after referring to the compact and the acceptance of it by Kentucky, declares the consent of that body to the erecting of the said district into a separate and independent state, upon a certain day, and receiving her into the Union.

"Now, it is perfectly clear that, although congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent state without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But congress, after recognizing the conditions upon

which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of congress become a valid one, were necessarily assented to, not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this is to deny the validity of the act of congress, without which Kentucky could not have become an independent state; and then it would follow that she is at this moment a part of the state of Virginia, and all her laws are acts of usurpation."

To the same effect is the decision in Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, 565-6, where the court say:

"It is objected that there is no act of congress prohibiting obstructions on the Ohio river, and that, until there shall be such a regulation, a state, in the construction of bridges, has a right to exercise its own discretion on the subject.

"Congress have not declared in terms that a state, by the construction of bridges, or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And they have expressly sanctioned the compact made by Virginia with

Kentucky, at the time of its admission into the Union, 'that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory that shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States.' Now, an obstructed navigation can not be said to be free. It was, no doubt, in view of this compact, that, in the charter for the bridge, it was required to be so elevated, as not, at the greatest height of the water, to obstruct navigation. Any individual may abate a nuisance. 5 Bac. Ab. 797; 2 Roll Ab. 144-145; 9 Co. 54; Hawk., P. C. 75, §12.

"This compact by the sanction of congress has become a law of the Union. What further legislation can be desired for judicial action? In the case of Green v. Biddle, 8 Wheat. 1, this court held that a law of the state of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void, and they say this court has authority to declare a state law unconstitutional, upon the ground of its impairing a compact between different states of the Union. * * *

"No state law can hinder or obstruct the free use of a license granted under an act of congress. Nor can any state violate the compact, sanctioned as it has been, by obstructing the river."

In Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 430, this court, speaking of the earlier decision just quoted from, say:

"The bridge has been constructed under an act of the legislature of the state of Virginia; and it

was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of congress in the regulation of commerce. It was claimed, however, that congress had acted upon the subject and had regulated the navigation of the Ohio river, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of congress, which were the paramount law.

"This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the constitution and laws of congress, nor in applying the appropriate remedy in behalf of the plaintiff. The ground and principles upon which the court proceeded will be found reported in 13 How. 518.

"Since, however, the rendition of this decree, the acts of congress, already referred to, have been passed, by which the bridge is made a post road for the passage of the mails of the United States, and the defendants are authorized to have and maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it.

"So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, it is not so in the contemplation of law. * * *

"It is also urged that this act of congress is void, for the reason that it is inconsistent with the compact between the states of Virginia and Kentucky, at the time of the admission of the latter into the Union, by which it was agreed 'that the use and navigation of the river Ohio, so far as the territory of the proposed (state), or the territory that shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States,' and which compact was assented to by congress at the time of the admission of the state.

"This court held, in the case of Green v. Biddle, 8 Wheat. 1, that an act of the legislature of Kentucky in contravention of the compact was null and void, within the provision of the constitution forbidding a state to pass any law impairing the obligation of contracts. But that is not the question here. The question here is, whether or not the compact can operate as a restriction upon the power of congress under the constitution to regulate commerce among the several states? Clearly not. Otherwise congress and two states would possess the power to modify and alter the constitution itself." (Pp. 432-3.)

This compact has been recognized as valid and binding upon the states in the following cases in the federal courts:

Hawkins v. Barney, 5 Pet. 457, 465;
Charles River Bridge v. Warren Bridge, 11 Pet. 420, 582;
McKinley v. Carroll, 12 Pet. 66, 69;
Pollard v. Kibbe, 14 Pet. 353, 413;
Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 610;
Stearns v. Minnesota, 179 U. S. 223, 245;
United States v. New Orleans, 17 Fed. 483, 488;
Griswold v. Bragg, 48 Fed. 519, 522;
See Poole v. Fleeger, 11 Pet. 185, 209;
Virginia v. Tennessee, 148 U. S. 503, 520-5.

This court has always sustained and enforced compacts between the states entered into with the consent of congress, as the constitution requires.

Poole v. Fleeger, 11 Pet. 185, 209;
Pollard v. Kibbe, 14 Pet. 353, 413;
Virginia v. Tennessee, 148 U. S. 503, 525;
Wharton v. Wise, 153 U. S. 155, 168;
Stearns v. Minnesota, 179 U. S. 223, 245.

It has been uniformly held that the contracts made by the states are protected by the constitution precisely as are contracts between individuals.

New Jersey Bank v. Wilson, 7 Cranch 164, 167;
Providence Bank v. Billings, 4 Pet. 514, 560;
Woodruff v. Trapnall, 10 How. 190, 207;

Wolff v. New Orleans, 103 U. S. 358, 365; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 550, 672.

There can be no doubt under the constitution that, when this court said in Green v. Biddle, 8 Wheat. 1, 87, that to deny the validity of the Virginia compact "is to deny the validity of the act of congress, without which Kentucky could not have become an independent state," and in Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, 566, that "this compact by the sanction of congress has become a law of the Union," it was deciding in accordance with the constitution. Under the constitution, territory of Virginia could not be taken by the United States for the creation of a state without the consent of Virginia, nor could Virginia have made any compact with Kentucky looking to its separation and admission, without the consent of the congress. By the very terms of the Virginia compact, it was conditioned upon its acceptance by the Kentucky convention and that prior to November 1, 1791, "the general government of the United States shall assent to the erection of the said district into an independent state, shall release this commonwealth from all its federal obligations arising from the said district as being part thereof, and shall agree that the proposed state shall, immediately after the day be fixed as aforesaid posterior to the first day of November, 1791, or at some convenient time future thereto be admitted into the Federal Union."

The act of congress passed February 4, 1791, recited the enactment of the Virginia statute and its acceptance by the Kentucky convention, and in terms consented to the conditions and provided for the admission of Kentucky. There was no contract binding upon any one until the approval of the act of congress. With that approval the two acts became one act, as they became one contract, and the agreement was tripartite, binding not only the citizens of Virginia and Kentucky, but also of the United States, the third party to the agreement.

It is true that by article 1, section 10, of the constitution it is provided that "no state shall enter into any treaty, alliance or federation;" but the same section qualifies this prohibition by the provision that "no state shall, without the consent of congress, * * * enter into any agreement or compact with another state, or with a foreign power." These two clauses must be construed together, and, thus construed, they clearly mean that no state shall enter into any treaty, agreement or compact with another state or a foreign power without the consent of congress.

Prior to the adoption of the constitution, compacts between the states were not infrequent and they were indifferently styled as compacts or treaties.

South Carolina v. Georgia, 93 U. S. 4, 9;
Aitcheson v. Endless Chain Dredge, 40 Fed. 253, 256;
Ex parte Marsh, 57 Fed. 719, 723.

In holding, therefore, that the Virginia compact "by the sanction of congress has become a law of the Union,"

this court construed the word "treaties" as broad enough to include compacts between the states assented to by congress, where it occurs in article 4, section 1, of the constitution, providing that "This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

In the recent case of Stearns v. Minnesota, 179 U. S. 223, 245, in sustaining the validity of a compact between Minnesota and the nation, this court quote with approval the language of Mr. Justice Story in Poole v. Fleeger, 11 Pet. 185, 209:

> "It can not be doubted that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the constitution of the United States. So far from there being any pretense of such a general surrender of the right, that it is expressly recognized by the constitution, and guarded in its exercise by a single limitation or restric-

> tion, requiring the consent of congress. The constitution declares, that 'No state shall, without the consent of congress, enter into any agreement or compact with another state;' thus plainly admitting that, with such consent, it might be done; and, in the present instance, that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally 'obligatory upon the citizens of both states.' "

The validity of the Virginia compact has been frequently admitted by the Kentucky court of appeals.

In Fowler v. Halbert, 4 Bibb, 52, 54 (1815), that court say of the Virginia compact:

> "That the legislature of this state is restrained from the passage of any law repugnant to the provisions of this compact will not be denied; not only on account of the occasion and manner the compact was entered into, but because it has also since been incorporated into the constitution of this country, and now forms part of the paramount law of the land."

In Church v. Chambers, 3 Dana 274, 278 (1835), that court say:

> "The Ohio river, as far as it is a boundary of this state is within its jurisdiction. The eleventh article of the compact with Virginia only guarantees to the citizens of all the states free and common use and navigation of the river; and to 'the states possessing the shores opposite to Virginia and Kentucky a concurrent jurisdiction.' * * *

> "A state having a concurrent jurisdiction of the Ohio river may certainly pass laws for preventing crimes and torts upon it without denying in the least degree to every citizen of the United States equal right to the lawful use and navigation of it, according to the full spirit and policy of the guaranty in the compact. And therefore Kentucky had a right to declare that the abduction of slaves, or the deportation or transportation of them in vessels on the Ohio river, within her jurisdiction, without the consent of the owners, and to their damage, should be unlawful. No question respecting a conflict of laws has arisen, or can probably ever arise, to produce embarrassment or vexation in the enforcement of such an enactment."

In Arnold v. Shields, 5 Dana 18, 22; 30 Am. D. 669, 673 (1837), that court not only recognize the validity of the compact, but construe it favorably to the construction contended for by plaintiffs in error, saying:

> "A still more interesting and decisive inquiry might be whether the statute of 1836 is inconsistent with that provision in the fundamental compact between Virginia and Kentucky which guarantees to the states opposite to them on the Ohio river a concurrent jurisdiction over that river.
>
> "Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power, legislative, judicial and executive, as that possesed by Kentucky over so much of the Ohio river as flows between them; consequently neither of them can, consist-

> ently with the compact, exercise any authority over their common river so as to destroy or impair or obstruct the concurrent rights of the other."

In McFall v. Commonwealth, 2 Met. 394, 398 (1859), the same court say:

> "The word jurisdiction, as applied to a state, and as used in the compact with Virginia, imports nothing more than the power to govern by legislation; and, without legislative enactments to enforce and carry out the jurisdiction so conferred, it can not, of itself, be regarded as operative, or effectual to protect the appellant, or to defeat the right of our own tribunals to enforce and execute our own penal and criminal statutes."

The compact with Virginia is again recognized by the Kentucky court as of binding effect in the case of Louisville Bridge Co. v. Louisville, 81 Ky. 189, 194 (1883). It has been so recognized by the general court of Virginia in Garner's Case, 3 Gratt. 655, 674, and by the supreme court of appeals of West Virginia in the case of State v. Plants, 25 W. Va. 119, 52 Am. 211.

That the compact, from the beginning, was intended as a contract, and to continue until repealed by the joint action of the two states is apparent from the language of section 14:

> "If the said convention shall approve of the erection of said district into an independent state on the foregoing terms and conditions, * * * the said articles become a solemn compact, mutu-

ally binding on the parties, and unalterable by either without the consent of the other."

It can not be disputed that the consent of the United States was also indispensable to any alteration or repeal. (Constitution, article I, section 10.)

8. EXTRA-TERRITORIAL JURISDICTION.

It is perfectly clear that there is a distinction between jurisdiction and ownership, and that states may possess extra-territorial jurisdiction, and have quite frequently done so.

Vattel, in his law of Nations, in book I, at section 203, says:

> "The country which a nation inhabits, whether that nation has emigrated thither in a body, or the different families of which it consists were previously scattered over the country, and, there uniting, formed themselves into a political society, that country, I say, is the settlement of the nation, and has a peculiar and exclusive right to it.
>
> "This right comprehends two things: (1) The domain, by virtue of which the nation alone may use the country for the supply of its necessities, may dispose of it as it thinks proper, and derive from it every advantage it is capable of yielding. (2) The empire, or the right of sovereign command, by which the nation directs and regulates at its pleasure everything that passes in the country."

And at section 295 of the same book the author says:

> "It is, however, true that the empire, and the domain or property are not inseparable in their

> own nature, even in a sovereign state. As a nation may possess the domain or property of a tract of land or sea without having the sovereignty of it, so it may likewise happen that she shall possess the sovereignty of a place, of which the property or the domain, with respect to use, belongs to some other nation."

Referring to this passage, Judge Robertson says, in his opinion in Garner's Case (3 Grattan, on p. 708):

> "That the soil or domain may be in one state and jurisdiction, concurrent or exclusive, in another, can admit of no doubt. Within certain limits, the United States possess jurisdiction over all the states; yet the states possess the soil or domain. The most then that could be justly presumed in conformity with the principle that gives as incidental to a grant all that is necessary to its enjoyment, would be jurisdiction over the space in question, and not the soil itself.
>
> "Independently of the legal presumption under the principle just adverted to, the attention of the court has been called to a clause in the act of Virginia creating the state of Kentucky; which declares that the respective jurisdictions of Virginia and Kentucky shall be concurrent only with the states that may possess the opposite shores."

In article I, section 8, of the constitution of the United States, congress is given the power

> "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states,

> and the acceptance of congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

Pursuant to this authority congress has purchased, in every state in the Union, grounds for postoffices, forts, magazines, arsenals, dockyards and other needful buildings, including, in many states, homes for disabled soldiers and sailors, the jurisdiction over the land having been, in every instance, ceded by the state to the federal government. Here we have, thus, in every state, land within the territorial boundaries of the state, jurisdiction over which, both civil and criminal, has been ceded to the federal government; and the validity of such cession of jurisdiction has been uniformly sustained by the courts.

This court and the federal courts generally have recognized and sustained the validity of the compact between New York and New Jersey of September 16, 1833, by which New Jersey retained "the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey," and it was agreed that "New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of the Hudson river lying west of Manhattan island and to the south of the mouth of Spuytenduyvel creek; and

of and over the lands covered by the said waters to the low-water mark on the westerly or New Jersey side thereof."

Devoe Manufacturing Co., 108 U. S. 401, 411, 412;
The Norma, 32 Fed. 411, 413.

In very many states municipalities have been properly given a territorial jurisdiction for certain purposes extending beyond their corporate limits; and such extra-territorial jurisdiction has been uniformly sustained by the courts.

In the state of Kentucky, cities of the first class may condemn any property in the county for municipal purposes. (Ky. St., 1899, §§2831, 2852.) Cities of the second class are given jurisdiction over the territory within two miles from their corporate limits for the purpose of protecting the public health; and for the purpose of procuring a water supply their jurisdiction is unlimited. (Ky. St., 1899, §3058.) Cities of this class that border upon the Ohio river are given a concurrent jurisdiction on that river; and such as are separated by rivers are given concurrent jurisdiction over the boundary rivers. (Ky. St., 1899, §3039.) Cities of the third class have a jurisdiction extending ten miles beyond their corporate limits for the purpose of controlling contagious disease, by clause 3 of section 3290; and by clauses 4, 5 and 9 are given jurisdiction wider than their limits for various purposes. Cities of the fourth class, by clause 6, have a jurisdiction one mile beyond their limits for the protection of the public health; and by clauses 8 and 27 are given extra-territorial jurisdiction for other purposes. §3490.

It has been decided by the Kentucky court of appeals in the case of Board of Trustees of Falmouth v. Watson, 5 Bush 660, that such an extension of jurisdiction was valid and constitutional.

To the same effect are decisions in many other states:

Lutz v. Crawfordsville, 109 Ind. 466;
Emerich v. Indianapolis, 118 Ind. 279;
Kaufle v. Delaney, 25 W. Va. 410;
Flack v. Fry, 32 W. Va. 364;
Neal v. Commonwealth, 17 S. & R. 67;
Coldwater v. Tucker, 36 Mich. 474; 24 Am. 601;
Gould v. Rochester, 105 N. Y. 46;
Van Hook v. Selma, 70 Ala. 361; 45 Am. 85;
Chicago Packing Co. v. Chicago, 88 Ill. 221; 30 Am. 545;
Albia v. O'Harra, 64 Iowa 297;
State v. Franklin, 40 Kan. 410;
Hagood v. Hutton, 33 Mo. 244.

Assuming, then, from these authorities, that the Virginia compact is valid and binding, and that the principle of extra-territorial jurisdiction is a well recognized one, it remains to be seen what construction the state of Indiana and the courts of other states have placed upon the section of the compact under consideration.

4. CONTEMPORANEOUS CONSTRUCTION, USAGE AND ACQUIESCENCE.

If the language of the compact were doubtful, the fact that Indiana and Ohio had, from the very beginning, exercised the same jurisdiction over the Ohio as Kentucky

and Virginia and that the jurisdiction thus exercised was acquiesced in and conceded by Kentucky and Virginia would of itself, under the rule of contemporaneous construction recognized by this court, be sufficient to put the question at rest.

In Stuart v. Laird, 1 Cranch 299, 309, this court say in regard to a disputed right of the justices to sit as circuit judges:

> "To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer and have, indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

Prigg v. Pennsylvania, 16 Pet. 539, 621;
Cooley v. Board of Wardens, 12 How. 299, 315;
Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 733;
The Laura, 114 U. S. 411, 416;
Auffmordt v. Hedden, 137 U. S. 310, 329;
Schell's Executors v. Fauche, 138 U. S. 562, 572;
Field v. Clark, 143 U. S. 649, 691;
McPherson v. Blacker, 146 U. S. 1, 27;
Fairbank v. United States, 181 U. S. 283, 308.

Continuously since 1803, Indiana, as territory and state, has asserted and exercised jursidiction, executive, legisla-

tive and judicial over the Ohio, precisely as over any territory within the conceded boundaries of the state.

The laws referred to are in the printed statute books of the state and for the convenience of the court, are copied in an appendix filed with this brief, properly certified.

September 24, 1803, the territory promulgated "a law authorizing the appointment of a pilot," or pilots, to be appointed by the governor, give bond in the sum of eight hundred dollars, and receive a fee of two dollars, "for each boat he pilots through the rapids" of the Ohio. All other persons were forbidden to act as pilots under penalty of ten dollars to the use of the territory.

Laws Ind. Terr., 4 Sess., ch. IV, 1803.

This law was "adopted by the governor and judges before a territorial legislature existed."

At the first session of the territorial legislature, "an act to prohibit the giving or selling intoxicating liquors to Indians" was passed and approved August 15, 1805. This act forbade the sale or gift "to any Indian or Indians, or nation or tribe of Indians being within the territory, or waters adjoining to, or bounding the same, any rum, brandy, whiskey or other intoxicating liquor or drink." (Acts Ind. Terr. 1805, ch. 7.)

At the same session was passed an act to incorporate the Indiana canal company, approved August 24, 1805, by which Benjamin Hovey, George Rogers Clark, Aaron Burr, Jonathan Dayton and their associates were incorporated "for the purpose of making a canal at the falls of the Ohio." (Acts Ind. Terr. 1805, p. 35.)

At the first session of the general assembly after the admission of Indiana, an act was passed to regulate ferries over the Ohio (Acts Ind. 1816, p. 158), and a subsequent act for the same purpose was enacted in 1820. (Acts 1820, p. 120.)

Acts regulating pilotage at the falls of the Ohio were enacted January 10, 1818 (Acts 1818, p. 11), and in 1825 (Acts 1825, p. 51).

Acts in relation to a canal at the falls of the Ohio, authorizing the taking of any land "whether covered with water or not," were passed January 3, 1817. (Acts 1817, p. 219), January 28, 1818 (Acts 1818, p. 57), and January 31, 1824 (Acts 1823, p. 78).

December 28, 1829, an act was approved which read as follows:

> "An act explaining and regulating jurisdiction.
>
> "Whereas, some doubts have been suggested as to jurisdiction possessed by the several counties in this state upon those water-courses which are and have by law been declared navigable; to remove which doubts,
>
> "Be it enacted by the general assembly of the state of Indiana, That in all cases where the division line, either between this state, and those of Ohio, Kentucky and Illinois, or Michigan territory, or of any one or more counties within this state, shall be navigable streams or waters, or those declared so by law, the said several states and adjacent counties within this state shall have, possess and exercise concurrent jurisdiction over the said navigable streams, for the enforcement of civil or criminal justice." (Acts 1829, p. 84.)

January 28, 1830, the general assembly of Indiana adopted the following joint resolution:

> "Be it resolved by the general assembly of the state of Indiana, That it shall be the duty of the secretary of state to have the eleventh section of the act of the commonwealth of Virginia, entitled 'An act concerning the erection of the district of Kentucky into an independent state,' passed the 18th of December, 1789, attached to and published with the laws of this session." (Indiana Acts 1830, p. 180.)

On page 182 of the Indiana Acts of 1830 appears the section of the compact under consideration.

January 24, 1831, the general assembly of the state of Indiana passed "an act organizing the circuit courts, and defining their powers and duties." (Indiana R. S. 1831, p. 138.)

By section 14 of this act it is provided:

> "That in all cases where the division line, either between this state and the states of Ohio, Kentucky and Illinois, or the Michigan territory, or of any one or more counties, within this state, shall be navigable streams or waters, or those declared so by law, the said several states, and adjacent counties within this state, shall have, possess and exercise, concurrent jurisdiction over the said navigable streams, for the enforcement of civil or criminal justice."

In 1849 the supreme court of Indiana, in the case of McFadin v. State, 1 Ind. 557, held that the fourteenth sec-

tion above quoted is continued in force by the revised statutes of Indiana of 1843.

Section 2 of chapter I of the revised statutes of Indiana of 1843 is as follows:

> "The state of Indiana possesses jurisdiction and sovereignty coextensive with the boundaries as declared in the preceding section, and has concurrent jurisdiction in civil and criminal cases, with the state of Kentucky on the Ohio river, and with the state of Illinois on the river Wabash, so far as said rivers form the common boundary between this state and the said states respectively." (Ind. R. S. 1843, p. 66.)

A marginal reference is made to the Virginia compact on page 19 of the same revision.

The Indiana constitution of 1851, which is still in force, contains the following provision, in article XIV, section 2:

> "The state of Indiana shall possess jurisdiction and sovereignty coextensive with the boundaries declared in the preceding section; and shall have concurrent jurisdiction, in civil and criminal cases, with the state of Kentucky, on the Ohio river, and with the state of Illinois, on the Wabash river, so far as said rivers form the common boundary between this state and said states, respectively."

The revised statutes of Indiana of 1852, in volume 1, at page 197, contain the following provisions, which are still in force:

> "Section 93. That the proper courts of the several counties in this state bordering on the Ohio

river, and on the Wabash river as far up as said river forms the boundary line between this state and the state of Illinois, shall have jurisdiction of all offenses committed against the penal laws of this state on said rivers, opposite to said counties, respectively. Whenever any violation of the penal laws of this state shall be committed on either of the above-named rivers, opposite to the line dividing any two counties bordering thereon, or so near to said line that it may be doubtful on which side of said line the offense was committed, the proper courts of either of the counties adjoining said line may take cognizance of said offense.

"Section 96. Whenever any part of the boundary of any county is the Ohio river, all process issuing to the officers of such county may be served on the said river, as far as the same is the boundary of this state."

These sections have never been repealed, and may be found in subsequent revisions.

1 R. S. Indiana, 1876, p. 222;
R. S. Indiana, 1881, §4207;
R. S. Indiana, 1901, §5544.

In Carlisle v. State, 32 Ind. 55 (1869), two men were convicted of murder committed on the Ohio river outside the territorial limits of Spencer county, Indiana, but opposite thereto. On appeal to the supreme court from a judgment of conviction, the judgment was affirmed, the court holding that, under the Virginia compact, the state of Indiana had concurrent criminal jurisdiction with Kentucky over the Ohio river upon the boundary of the state.

In Sherlock v. Alling, 44 Ind. 184 (1873), the supreme court held that, under the Virginia compact, Indiana had concurrent civil jurisdiction over the Ohio river between Indiana and Kentucky; and that this jurisdiction may be exercised in such manner as the state shall elect. This case was appealed to the supreme court of the United States, and there affirmed. Sherlock v. Alling, 93 U. S. 99.

In Dugan v. State, 125 Ind. 130, 9 L. R. A. 321 (1890), the supreme court affirmed a judgment of conviction against a steamboat pilot for violating the Sunday law of Indiana in carrying picnic parties between points on the Indiana shore on Sunday.

In Welsh v. State, 126 Ind. 71, 9 L. R. A. 664 (1890), the supreme court affirmed a conviction of appellant for selling intoxicating liquor in a boat anchored in the Ohio river opposite Harrison county, Indiana, in violation of the license laws of the state.

In Memphis & Cincinnati Packet Co. v. Pikey, 142 Ind. 304 (1895), the supreme court affirmed a judgment against appellant for damages occasioned by the wrongful killing of appellee's intestate, and held the service of summons good, where the same was read and copies delivered on a steamboat, near the middle of the Ohio river, between the low-water mark on the Indiana side and the low-water mark on the Kentucky side, opposite Dearborn county, Indiana.

In the most recent Indiana case, decided in 1895, the supreme court say, on page 308:

> "Appellant contends that the court below had no jurisdiction over the subject-matter of the action

for this reason, that the injury was inflicted outside of the territorial limits of the state of Indiana, and within the state of Kentucky; that, therefore, section 284 (285), supra, has no application in this case; that the right of action, if any, must depend upon the laws of Kentucky and not upon the laws of this state. The theory of the defense is that this state has no jurisdiction over the Ohio river beyond low-water mark on the Indiana side of the river. It is settled that low-water mark on this side of the Ohio river is the boundary line between this state and Kentucky. Handly's Lessee v. Anthony, 5 Wheat. 374; Indiana v. Kentucky, 136 U. S. 479; Carlisle v. State, 32 Ind. 55; McFall v. Commonwealth, 2 Met. (Ky.) 394.

"It is provided, however, by an act of the commonwealth of Virginia, entitled 'An act concerning the erection of the district of Kentucky into an independent state (passed December 18, 1789), that the use and navigation of the Ohio river, so far as the territory of the proposed state or the territory which shall remain within the limits of this commonwealth lies thereon, shall remain free and common to the citizens of the United States; and the respective jurisdiction of this commonwealth and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of said river.' Revised Laws of Virginia, Vol. 1, p. 59; 1 G. & H., p. 57; 3 R. S. 1894, p. 886.

"In Handly's Lessee v. Anthony, supra, the supreme court of the United States, referring to this act, by Marshall, Chief Justice, said that 'The compact with Virginia under which Kentucky be-

came a state stipulates that the navigation of and jurisdiction over the (Ohio) river shall be concurrent between the new states * * * which may possess the opposite shores of the said river.'

"This state has asserted this jurisdiction in section 2, article XIV, of the constitution (section 222, R. S. 1881; section 222, R. S. 1894), which declares that the state of Indiana 'shall have concurrent jurisdiction in civil and criminal cases with the state of Kentucky on the Ohio river, and with the state of Illinois on the Wabash river so far as said rivers form the common boundary between this state and said states respectively.' The general assembly has assumed the same jurisdiction. 1 G. & H., section 93, p. 190, section 96, p. 191; sections 1578, 1579 and 4207, R. S. 1881; sections 1647, 1648 and 5544, R. S. 1894, R. S. 1843, p. 66.

"It has been uniformly held by this court that the state possesses jurisdiction for the enforcement of the civil and criminal laws of the state on the Ohio river, where it constitutes the southern boundary of the state. Rorer Interstate Law, pp. 343-4; Carlisle v. State, supra; Dugan v. State, 125 Ind. 130 (9 L. R. A. 321); Welsh v. State, 126 Ind. 71 (9 L. R. A. 664); Sherlock v. Alling, admr., 44 Ind. 184, and authorities cited. In Sherlock v. Alling, admr., supra, a case like the one before us, this court held that section 284, R. S. 1881, (285) R. S. 1894, supra, was general and extended over all territory over which the state of Indiana has exclusive or concurrent jurisdiction, that it applies to cases where death is caused by wrongful acts or omissions on vessels while navigating the Ohio river where the same forms the

boundary of this state. It is clear from the authorities cited, that this state had concurrent jurisdiction over the Ohio river at the point where it is alleged the death of appellee's intestate was caused by the wrongful acts of appellant. The only difference is that, over the territory within the boundaries of the state, the jurisdiction is exclusive, while, on the Ohio river, it is concurrent with Kentucky. It necessarily follows that the law which governs this case, including the service of summons and return, is the same as if the Ohio river was wholly within the state of Indiana, where it forms the southern boundary of the state."

These authorities show that certainly since 1803 Indiana has exercised civil and criminal jurisdiction upon the Ohio river beyond low-water mark on the Indiana side; that it has done this on the declared authority of the Virginia compact; and that it has sustained and enforced the service of civil process on the river by appropriate legislation and in its courts. They also show that the state of Indiana and its courts have construed the concurrent jurisdiction granted by the Virginia compact as giving to it the right to enforce its laws and its process, civil and criminal, upon the river wherever it constitutes the boundary line between Indiana and Kentucky.

The same jurisdiction has been exercised by Ohio and Illinois over the Ohio river as by Indiana, certainly for very many years.

By the Ohio code of 1853 it is provided that:

"Actions for the following causes must be

brought in the county where the cause, or some part thereof, arose:

"1. For the recovery of a fine, forfeiture or penalty imposed by a statute, except that, when it is imposed for an offense committed on a river, or other water-course, or a road, which is the boundary of the state, or of two or more counties, the action may be brought in any county bordering on such river, water-course, or road, and opposite to the place where the offense was committed." R. S. Ohio, 1898, §5025.

In the Ohio decisions, it is apparent that the jurisdiction exercised by the state over the Ohio river is based on the Virginia compact.

Lessee of Blanchard v. Porter, 11 Ohio, 138, 142;

Stephens v. State, 14 Ohio, 386, 389;

Eckert v. Colvin, 1 Ohio Dec. (reprint) 11; 2 West. L. J. 54;

State v. Hoppess, 1 Ohio Dec. (reprint) 105; 2 West. L. J. 279;

Garner's Case, 3 Gratt., p. 754;

Charge to Grand Jury, 32 Weekly Law Bull. 275.

The Illinois constitution of 1848 contains the following provision:

"Article I. Boundaries. §1. The boundaries and jurisdiction of the state shall be as follows, to wit: Beginning at the mouth of the Wabash river; thence up the same and with the line of Indiana to

the northwest corner of said state; thence east, with the line of the same state, to the middle of Lake Michigan; thence north, along the middle of said lake, to north latitude 42 degrees and 30 minutes; thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river; and thence up the latter river, along its northwestern shore, to the place of beginning: Provided, That this state shall exercise such jurisdiction upon the Ohio river as she is now entitled to, or such as may be agreed upon by this state and the state of Kentucky."

Article I, §1, of the Illinois constitution of 1870 is identically the same.

In 1849 the Illinois general assembly enacted the following statute:

"An act concerning the jurisdiction of the state of Illinois over the Ohio river.

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, That hereafter the jurisdiction of the state of Illinois shall be considered as extending, and as being concurrent with the State of Kentucky, over the Ohio river.

"§2. Each of the several counties of this state, lying on the Ohio river and bounded thereby, are hereby invested with concurrent jurisdiction over the said river, in all cases occurring on said river and opposite to each of the said counties.

"§3. Nothing herein contained shall be so construed as to extend the jurisdiction of said state over any islands in said river included within the

corporate limits of any county in the said state of Kentucky.

"Approved February 9, 1849." (Acts Ill. 1849, p. 134.)

This is still the law of Illinois. R. S. Ill. 1899 (Hurd), p. 488, §2.

In 1845 an act was passed by Illinois confirming the title to ferries over the Ohio river, previously granted. R. S. Ill. 1845, p. 254, §10; R. S. Ill. 1899 (Hurd), p. 905, §20.

That the construction claimed by Indiana has been several times conceded by the Kentucky court of appeals, appears from the passages quoted from the cases named below.

Church v. Chambers, 3 Dana 274, 278;
Arnold v. Shields, 5 Dana 18, 22; 30 Am. D. 669, 673;
McFall v. Commonwealth, 2 Met. 394, 398.

As shown in the dissenting opinion in this case, Meyler v. Wedding, 107 Ky. 691, 704, the construction given by the majority of the court is "now adopted for the first time over a century after the act was passed."

In Church v. Chambers, 3 Dana, on page 279, the court, speaking of the concurrent jurisdiction granted by the Virginia compact, say:

> "A state having concurrent jurisdiction of the Ohio river may certainly pass laws for preventing crimes and torts upon it without denying in the least degree to every citizen of the United States

equal right to the lawful use and navigation of it, according to the full spirit and policy of the guarantee in the compact. And, therefore, Kentucky had a right to declare that the abduction of slaves, or the deportation or transportation of them in vessels on the Ohio river, within her jurisdiction, without the consent of the owners, and to their damage, should be unlawful. No question respecting a conflict of laws has arisen or can probably ever arise, to produce embarrassment or vexation in the enforcement of such an enactment."

In Arnold v. Shields, 5 Dana, on page 3, the court say:

"Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial and executive—as that possessed by Kentucky, over so much of the Ohio river as flows between them; and, consequently, neither of them can, consistently with the compact, exercise any authority over their common river, so as to destroy, or impair, or obstruct the concurrent rights of the other."

In McFall v. Commonwealth, 2 Met., on page 398, the court say:

"The word jurisdiction, as applied to a state, and as used in the compact with Virginia imports nothing more than the power to govern by legislation; and without legislative enactments to enforce and carry out the jurisdiction so conferred, it can not, of itself, be regarded as operative, or effectual to

protect the appellant, or to defeat the right of our own tribunals to enforce and execute our own penal and criminal statutes."

Examining the language of these three decisions, in view of the legislation of Indiana already quoted, it certainly can not be said that Indiana has failed in its legislation to extend its penal and civil laws over the Ohio river, or has failed in any way to provide by legislation means for enforcing them.

That the general assembly of Kentucky has placed the same construction upon the words "concurrent jurisdiction" in the compact as have the courts of Indiana, Ohio and Virginia, is apparent from the Kentucky statute as to criminal jurisdiction of courts:

> "The circuit court of each county bordering on the Mississippi, Ohio, Big Sandy or Tennessee rivers shall have concurrent jurisdiction of any treason or felony committed on any of said rivers." Ky. St. 1899, §1144.

With what other authority than that of the states upon the opposite side of the Ohio can circuit courts of counties bordering that river have concurrent jurisdiction?

The same article provides that—

> "In all cases where any part of a river, water, water course, highway, road or street shall be the boundary line between two counties, the courts and judges and justices, and all circuit and county officers of both such counties shall have concurrent jurisdiction in all cases over the whole extent of

> such parts of said river, water, water course, highway, road or street." Ky. St. 1899, §1143.

What possible meaning in this statute can the words "concurrent jurisdiction" have, other than the equal right to serve process and prosecute violations of the law occurring upon any part of the boundary river?

It is to be noted in the same statute that, for the furtherance of justice, section 1146 provides for concurrent jurisdiction in case of doubt; and section 1147 where an injury is inflicted in one county and death occurs in another.

Section 3039, with regard to the boundaries and jurisdiction of cities of the second class, provides that—

> "If the boundary line between any two or more of said cities (meaning, of course, Covington and Newport), or of any such city and the county or counties not embraced in said city, shall be the Licking river, or other stream within the state, each city shall have concurrent jurisdiction with the other, and with the said county or counties, over the waters of such river or stream opposite thereto."

What in this section can the words "concurrent jurisdiction" mean, other than the equal right to exercise authority, and to enforce its ordinances and by-laws upon the boundary river?

The same construction as that given by the courts of Indiana, Ohio and Kentucky was given the words "concurrent jurisdiction" in the Virginia compact as to the jurisdiction of Ohio on the Ohio river by the general court

of Virginia in Garner's Case, 3 Gratt. 655. In the principal opinion by Judge Taliaferro (p. 676), he says for the court that Virginia, having only concurrent jurisdiction on the river, it would have no criminal jurisdiction of an offense committed on the Ohio side of low-water mark, because—

> "The prisoners were not afloat; they were not in the canoe; they were in the water standing on the ground."

In this respect, his opinion is in entire agreement with that of the supreme court of Iowa in the cases of Gilbert v. Moline Water Power Co., 19 Iowa 319, and State v. Mullen, 35 Iowa 199, to the effect that concurrent jurisdiction over the boundary river only gives jurisdiction over objects on the river beyond the territorial limits, and does not apply to objects resting on the bed of the river beyond the territory of the state in which jurisdiction is claimed.

In the concurring opinion of Judge Johnston in the same case (3 Gratt., p. 736) he says:

> "I conclude, therefore, that Virginia has exclusive jurisdiction to low-water mark on this side of the river, and Ohio has exclusive jurisdiction on the other, while over the main permanent river they both possess concurrent jurisdiction; the ultimate property in the whole river to low-water mark on the Ohio side remaining in Virginia, so that, if the river should at any time suddenly change its course, leaving its present bed bare, the land thus deserted would belong to Virginia up to low-water mark on the Ohio side."

In the case of State v. Plants, 25 W. Va. 119, 52 Am. 211, the supreme court of appeals of West Virginia, in considering the same question, say:

> "The question here presented was not decided in Garner's case. The question here is the third one adjourned to the general court in that case: 'Is the jurisdiction of West Virginia coextensive with the water, while it is confined within its banks?' We are in this case prepared to hold that the jurisdiction of West Virginia is coextensive with the water of the Ohio river while it is confined within its banks, and that the state in the proper county has jurisdiction of offenses committed on a boat afloat on the Ohio river while confined within its banks, whether such a boat is or is not fastened to some object on the bank. If this were not so, our citizens might with impunity violate our revenue and other laws."

In the very recent case of State v. Faudre, decided by the supreme court of appeals of West Virginia, November 14, 1903, and as yet unreported, a copy of the opinion being printed in the appendix to this brief, the court say:

> "How it could be otherwise considered alone under the compact made by Virginia upon the admission of Kentucky to the Union? That compact makes the Ohio a public highway and gives concurrent jurisdiction over it to all states bordering on it, and deprives Virginia of exclusive jurisdiction over it. Wheeling Bridge Case, 13 Howard 518."
> * * *

"In Garner's Case, 3 Gratt. 655, Judge Johnston said: 'I conclude, therefore, that Virginia has exclusive jurisdiction to low-water mark on this side of the river, and Ohio has exclusive jurisdiction on the other, while over the permanent river they both possess concurrent jurisdiction; the ultimate property in the whole river to low-water mark on the Ohio side remaining in Virginia.' Here is properly ceded concurrent jurisdiction. The soil on which the river runs is West Virginia soil to low-water mark on the Ohio side; but the water flowing over it is subject to concurrent jurisdiction of both states for certain purposes. It is this concurrent jurisdiction that rules this case. Above I have stated what it means; I add other authorities. Concurrent is 'running together; having the same authority; thus we say such and such courts have concurrent jurisdiction, that is, each has the same jurisdiction.' Bouv. Law Dic. 'By conferring "concurrent jurisdiction" congress intended to declare that transactions occurring anywhere on that river, between the two states, might lawfully be dealt with by the courts of either according to its law. Where a court of one state assumed jurisdiction in a particular case it would be exclusive until relinquished.' Sanders v. N. O. & St. L. Anchor Line, 97 Mo. 26. See State v. George, 60 Minn., p. 505; Opsal v. Judd, 30 Minn., p. 129; Memphis v. Pikey, 142 Ind. 304; Welsh v. State, 126 Ind. 71, 9 L. R. A. 64; Meyler v. Wedding, 60 S. W. 20. Rorer on Interstate Law, 337, lays down correct law: 'The existence of concurrent jurisdiction in two states over a river that is a boundary between

them vests in each of such states, and its courts, except as to things permanent, and except as to maritime and commercial matters cognizable by the national government and its courts, jurisdiction both civil and criminal, from shore to shore, of all matters of rightful state cognizance occurring upon such river in all parts thereof where it forms such common boundary.' Observe, that it says that this concurrent jurisdiction applies to 'all matters of rightful state cognizance occurring upon such river in all parts thereof.'

"Now, is not the establishment and regulation of a ferry a matter of rightful state cognizance? Indeed, is it not a right of navigation? Can you deny that to a state on the Ohio river? Is it not a means of commerce on the water of the river? Can you deny the right of commerce?

"Observe, that there is a difference between the soil or ground over which the Ohio runs, and its flowing water. The soil and things present in or attached to it, a bridge, for instance, are not subject to Ohio jurisdiction; but a boat used in ferriage is not such; a thing floating on the water. Many cases draw this distinction, holding that where there is concurrent jurisdiction in two states upon a river, a state has no power over soil or things fixed in it beyond its line; but as to things not such, but transitory, floating upon it, both have common concurrent power. The late well considered case of Roberts v. Fullerton, 93 N. W. 1111, in the supreme court of Wisconsin, shows this distinction. There it is held that as to soil and things attached, the concurrent jurisdiction does not extend; but as

> to things having relation to the water, things transitory or floating upon it, it does fully extend. Mississippi v. Ward, 2 Black 485. Judge Taliaferro, in Garner's Case, 3 Gratt. 655, said it refers 'only to things afloat.' Surely both states may establish and regulate ferries over the Ohio."

If the states of Ohio and Indiana have no jurisdiction over the Ohio river, it necessarily follows that the federal districts of those states, whose boundaries are absolutely identical with the states, would have no jurisdiction over the river, and the district courts of the United States in Indiana and the southern district of Ohio would have no jurisdiction in admiralty cases arising on the Ohio river.

> Devoe Manufacturing Co., 108 U. S. 401;
> The Norma, 32 Fed. 411.

It has, however, been uniformly held, from the time when the federal courts first began to exercise admiralty jurisdiction over the western rivers, that the district courts of Indiana and Ohio possessed admiralty jurisdiction over the Ohio river.

> McGinnis v. The Pontiac, 5 McLean 359; 16 Fed. Cas. 8,801;
> Seven Coal Barges, 2 Biss. 297; 21 Fed. Cas. 12,677;
> The Lewellen, 4 Biss. 156; 15 Fed. Cas. 8,307;
> Longstreet v. Steamboat R. R. Springer, 4 Fed. 671;
> The Liberty No. 4, 7 Fed. 226;

The Guiding Star, 9 Fed. 521; 18 Fed. 263;
The Cherokee, 15 Fed. 119;
The Thomas Sherlock, 22 Fed. 253;
Baumgartner v. The W. B. Cole, 49 Fed. 587;
Memphis and Cincinnati Packet Co. v. Overman Carriage Co., 93 Fed. 246;
The City of Clarksville, 94 Fed. 201;
Bennitt v. Guiding Star, 53 Fed. 936;
Wilbour v. Hegler et al., 62 Fed. 407;
Kineon v. The New Mary Houston, 69 Fed. 362.

So that it appears that the federal courts have placed the same construction on the words "concurrent jurisdiction" in the Virginia compact that the state courts of Indiana and Ohio have.

As shown, the executive and legislative and judicial departments of Indiana have not only claimed, but have actually exercised jurisdiction of every kind over the Ohio river where it serves as a boundary, for a hundred years. For an almost equal length of time the states of Ohio and Illinois have done the same thing. The states of Kentucky, Virginia and West Virginia have not only not disputed this exercise of authority, but their courts and their legislatures have conceded that it is rightful. Under such conditions, were the authority of doubtful origin, the acquiescence of Kentucky for so long a time is, in the words of this court, "conclusive of" Indiana's "title and rightful authority."

In the case of Indiana v. Kentucky, 136 U. S. 479, 509, this court say:

"It was over seventy years after Indiana became a state before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why, then, did she delay to assert by proper proceedings her claim to the premises? On the day she became a state, her right to Green River island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterward, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two states now hinge, and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

"This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of Rhode Island v. Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or of individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.'

"Vattel, in his Law of Nations, speaking on the same subject, says: 'The tranquillity of the people,

> the safety of states, the happiness of the human race, do not allow that the possessions, empire and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title. Book II, c. XI, §149. And Wheaton, in his International Law, says: 'The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question."

In the case of Edwards County v. White County, 85 Ill., on page 392, the supreme court of Illinois say:

> "If the language of the statute were more ambiguous than we conceive it to be, it would still be competent, in solving the doubt, to consider the acts of the public authorities in recognition of the boundary line; and, upon principles of public policy, where, as here, courts, assessors and collectors of taxes, and other officers having duties, limited to the respective counties, to perform, have for a long

time, recognized and acted upon the assumption that a given line is the true boundary line between the counties, we shall not inquire whether, in the first instance, the line was the one intended or not. The quiet and good order of communities ought not to be disturbed by controversy in regard to such questions, after, at least, the expiration of the period fixed for the limitation of actions between individuals where title to real estate is controverted; and this, not because in such a controversy counties are necessarily within the contemplation of the statute of limitations, but because the public welfare forbids that the possibility of strife and controversy in regard to boundary lines between counties should continue indefinitely. The principle is recognized in Hamilton v. McNeil, 13 Grattan 389, and Hooker v. Sterling, 36 Pa. St. 423.

"White county has been in the undisturbed possession of the territory in dispute for almost half a century, and, we think, in any view of the meaning of the act of January 22, 1829, it would be wholly unjustifiable in a court of law or equity to now question her right or authority."

5. WHAT IS CONCURRENT JURISDICTION?

The construction given to the words "concurrent jurisdiction" by the courts of Indiana, Ohio, Virginia and West Virginia, and by the courts of Kentucky, prior to the decision in this case, is in entire accordance with the uniform construction of the words by other courts.

In the first edition of the American and English Encyclopedia of Law, the principle is laid down that "when

states are separated by boundary rivers, the courts of each state have concurrent jurisdiction over the river." 12 Am. and Eng. Ency. of Law, 296.

In Rapalje's and Lawrence's Law Dictionary, concurrent jurisdiction is defined as the "jurisdiction of several different tribunals, each authorized to deal with the same subject matter at the choice of the suitor."

In Bouvier's Law Dictionary, concurrent is defined as "running together; having the same authority; thus, we say such and such courts have concurrent jurisdiction, that is, each has the same jurisdiction."

In the second edition of Rorer on Interstate Law at page 438, the author says:

> "The existence of concurrent jurisdiction in two states over a river that is a common boundary between them, * * * vests in each of such states, and in the courts thereof, except as to things permanent, and except as to maritime and commercial matters cognizable by the national government and courts, jurisdiction, both civil and criminal, from shore to shore, of all matters of rightful state cognizance occurring upon such river in all parts thereof where it forms such common boundary. Such concurrent jurisdiction obviates the difficulty in judicial proceedings of ascertaining on which side of the main channel of a boundary river occurrences have transpired or crimes have been committed.
>
> "The jurisdiction first attaching holds the case. Of the matters thus subject to the concurrent jurisdiction of the state, the court which gets actual jurisdiction of the cause, or subject of legal adjudi-

> cation, prosecution or trial, is entitled to hold the same to a final determination thereof, and neither party thereto can be forced into a different jurisdiction upon the same subject-matter of litigation unless the case be removable to the United States court. Moreover, the full and final adjudication thereof upon the merits by such court of concurrent jurisdiction directly made is conclusive, and a bar in all courts wherein the same subject-matter between the same parties comes judicially in question."

The states of Illinois and Missouri are divided by the middle line of the main channel of the Mississippi river. This has been very repeatedly decided. Congress conferred upon both states concurrent jurisdiction over the Mississippi river in almost precisely the same language used in the Virginia compact.

The state of Illinois, by legislation very similar to that of Indiana, conferred upon its counties bordering on the Mississippi, Ohio and Wabash rivers, "jurisdiction over such river to the extent it is so bounded, which jurisdiction may be exercised concurrently with the contiguous states bounded by such river."

In defining the concurrent jurisdiction thus possessed, the appellate court of Illinois, in the case of Wiggins Ferry Company v. Reddig, 24 Ill. App. 260, 265, uses this language:

> "From these statutes, both national and state, it is apparent that this great river is treated as a highway belonging to neither state, and yet over

> which each state exercises joint and equal power and authority for all judicial purposes, and, to enable them to redress private wrongs or punish crimes, the boundaries of each may be said to extend to the farther shore. Either a private or a public wrong being committed upon the waters of the river, this common highway of the people, may then be said to be committed within the jurisdiction of either state, and undoubtedly it would be held that the judicial tribunal first taking cognizance of the cause would, under well established and understood principles, retain its jurisdiction to the end of the controversy, applying the law of the forum to the facts of the case in settling the rights of the parties."

In the case of Sanders v. New Orleans & St. Louis Anchor Line, 97 Mo. 26, the same questions with regard to the meaning of concurrent jurisdiction were considered by the supreme court of Missouri in an action brought for damages resulting from the negligent killing of a minor child on the Mississippi river near the Illinois shore east of the main channel. It being conceded that the middle of the main channel forms the boundary line, and that the two states have concurrent jurisdiction, the supreme court of Missouri say, on page 30:

> "'Jurisdiction,' as applied to a state, signifies the authority to declare, and the power to enforce the law, as well as the territory within which such authority and power may be exercised. Those were its meanings in the language from which we derived the word and are its present meanings in our

> own. The jurisdiction of a state is co-extensive with its sovereignty. By conferring 'concurrent jurisdiction' congress intended to declare that (subject to the other laws of the United States) transactions occurring anywhere on that river, between the two states, might lawfully be dealt with by the courts of either according to its laws. Where a court of one state assumed jurisdiction in a particular case, it would be exclusive therein until relinquished. Missouri having accepted the terms of the act of congress, her sovereignty extends to the limits sanctioned by that act. We have no doubt that her laws reach and control the facts here disclosed, affecting citizens of this state."

To the same effect see the case of

Swearingen v. Steamboat Lynx, 13 Mo. 519.

In State v. Metcalf, 65 Mo. App. 681, Metcalf and others were indicted and convicted in Missouri on the charge of keeping a gaming house under facts which showed that they maintained a houseboat for gambling purposes west of, or on the Kansas side of, the middle of the main channel of the Missouri river at a point where the middle of that river is the boundary between Kansas and Missouri. By act of congress those two states have concurrent jurisdiction over the Missouri river where it is the common boundary. In construing these words ("concurrent jurisdiction") the Kansas City court of appeals say, on page 687:

> "Congress, by conferring concurrent jurisdiction, intended to declare that, subject to other laws

of the United States, transactions occurring anywhere on that river, and on every other river bordering on the state, so far as the same should form a common boundary to it and any other state or states, might be lawfully dealt with by the courts of either according to its laws. The sovereignty of this state extends to the limits which have been sanctioned by the acts of congress and formally adopted and ratified by the state itself. This is the well settled construction of these acts by the judiciary of this state. Swearingen v. Steamboat, 13 Mo. 510; Sanders v. Anchor Line, 97 Mo. 26; Cooley v. Golden, 52 Mo. App. 229.

"A cognate question has been before the supreme court of Iowa. In Gilbert v. Moline W. P. Mfg. Co., 19 Iowa 319, it is said that where injuries are inflicted upon persons and property by persons while on the river, for which they should be held answerable criminally as well as civilly, if jurisdiction in all such cases was made to depend on the inquiry whether the boat or vessel was on one side or the other of the main channel; whether the injury inflicted or crime committed east or west, or north or south of such line, it can be readily seen that it would be frequently impossible to determine such jurisdiction and a mistake in this respect would prove fatal to the prosecution. And in State v. Mullen, 35 Iowa 199, it was said that it is claimed that the boundary of Lee county on the east is co-extensive with that of the state, which is the middle of the main channel of the Mississippi river, and that the local jurisdiction of the district court is of offenses committed in the county in which it was held, and that the district court has

no jurisdiction to try an offense committed without the boundary of the county, to wit, east of the middle of the main channel of the Mississippi river. If this be true, it amounts to this: That congress has conferred upon the state, and the state, by positive statute, has assumed a jurisdiction which it has vested in no court and for which it has provided no means of making it effective. That the state possesses a jurisdiction which is vested in no department of the government is a proposition which involves a contradiction. But general jurisdiction for the trial of crimes is vested nowhere, unless it be in the district court. Congress having granted to the state of Iowa jurisdiction concurrent with that of Illinois over the Mississippi river, jurisdiction over so much of the river as lies opposite to any county on the eastern boundary of the state must attach to such county as an incident to its organization. For it is only through the medium of county organization that this jurisdiction can be rendered availing, and it is a familiar doctrine that the grant of a right or power carries with it, as an incident, everything necessary to make the right or power effective.

"The reasoning of the Iowa court in these cases, and especially in the latter, whose salient facts are almost identical with those in the present case, is such as commends itself to our approving judgment, so that we feel that we can not do better than to adopt the same, since it completely answers the objections urged by the defendants to the jurisdiction of the court in which they were convicted. And we may add that similar rulings have also been

made by the Indiana and Kentucky courts of last resort. Carlisle v. State, 32 Ind. 55; Sherlock v. Alling, 44 Ind. 184; Church v. Chambers, 3 Dana (Ky.) 274."

In State v. Mullen, 35 Iowa 199, one convicted of maintaining a house of ill-fame, in an Iowa district court, appealed to the supreme court, contending that Iowa had no jurisdiction because the boat was anchored in the Mississippi river at a point east of the boundary line between Iowa and Illinois, and at low water mark was aground. The question was whether, under the concurrent jurisdiction granted by congress, Iowa could abate the house as a nuisance. The court, on page 201, after quoting the act of congress giving Iowa and Illinois concurrent jurisdiction over the river, say:

> "Commenting upon this statute this court, in Gilbert v. Moline Water-Power and Manufacturing Company, said: 'Injuries are inflicted upon persons and property, by persons while on the river, for which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases was made to depend on the inquiry, whether the boat or vessel was on the one side or the other of the main channel; whether the injury was inflicted or crime committed east or west, or north or south of such line, it can be readily seen that it would be frequently almost impossible to determine such jurisdiction, and that a mistake in this respect would prove fatal to the action or prosecution. And hence the reason of making the jurisdiction concurrent in all such cases.' 19 Iowa, 319.

"Pursuant to this act of congress the Revision, chapter 1, section 3, provides that: 'The state has concurrent jurisdiction on the waters of any river or lake which forms a common boundary between this and any other state.' Under this legislation, it must, we think, be conceded that the state of Iowa has jurisdiction to punish a crime committed on the Mississippi river opposite its boundary and east of the middle of the main channel. The question which arises under this instruction is: Does this jurisdiction exist under the facts therein stated? In other words, does the fact that the boat, at the time of the indictment and of the trial, was on the east side of the main channel of the river, resting temporarily in the rear of the island, because the water had receded from it, or for repairs, take it out of the jurisdiction of this state? It seems to us clearly that it does not. In the eye of the law a crime committed on the boat, under the circumstances stated, is as much an offense perpetrated on the river, as though the vessel were at the time afloat. If it is not so, it follows that, if a vessel navigating the Mississippi river should run aground east of the middle of the main channel, and the water should recede, leaving it upon the ground temporarily, the state of Iowa would have no jurisdiction over a crime committed upon it under such circumstances, and hence would arise the question so difficult of determination, and which it was the purpose of the act of congress above cited to avoid, whether the act in question was committed one foot east or one foot west of the medium filum aquae.

"Further, it is claimed that the boundary of Lee county on the east is co-extensive with that of the state, which is the middle of the main channel of the Mississippi river, and that the local jurisdiction of the district court is of offenses committed in the county in which it is held, and that the district court has no jurisdiction to try an offense committed without the boundary of the county, to wit, east of the middle of the main channel of the Mississippi river. If this be true it amounts to this: That congress has conferred upon the state, and the state, by positive statute, has assumed a jurisdiction which it has vested in no court, and for which it has provided no means of making effective. That the state possesses a jurisdiction which is vested in no department of the government is a proposition which involves a contradiction. But general jurisdiction for the trial of crimes is vested nowhere unless it be in the district court. Congress having granted to the state of Iowa jurisdiction concurrent with the state of Illinois over the Mississippi river, jurisdiction over so much of the river as lies opposite to any county on the eastern boundary of the state must attach to such county as an incident of its organization. For it is only through the medium of county organizations that this jurisdiction can be rendered availing, and it is a familiar doctrine that the grant of a right or power carries with it as an incident everything necessary to make the power or right effective. * * *

"We are referred to the case of Gilbert v. The Moline Water-Power and Manufacturing Company, 19 Iowa, 319. That this case was rightly decided, under the facts presented, admits of no ques-

tion. It was an action in the courts of this state to restrain, by injunction, the defendants from continuing a dam across the south or slough channel of the Mississippi river, from the head of Rock Island, which is in the state of Illinois, to the main shore in said state. It was held that this dam was not on the river, in the sense of the act of congress, and that the courts of this state had no power to decree its removal as a nuisance. The same principal was involved in M. & M. R. R. Co. v. Ward, 2 Black, 485. The dam in question rested permanently upon the soil of the state of Illinois, and was attached to the main shore. It became a part of the realty of the state, and might well be said not to be on the river in such sense as to subject it to the jurisdiction of this state. But in the case at bar the facts are very different. The boat was constructed, not for the purpose of being permanently attached to the soil, but of floating upon the surface of the river. It was afloat or aground as the waters rose or receded. When it settled down upon the soil in consequence of the recession of the water, it did not become real estate. It rested upon no foundations. It had no fixed location. With every rise of the river it floated. Hence, it was on the river in a sense very different from the dam considered in the case above cited. And, if on the river, it became subject to the jurisdiction of this state concurrently with that of the state of Illinois, and the judgment of the court was right."

In the case of Buck v. Ellenbolt, 84 Iowa, 394, 396, 15 L. R. A. 187, 189, the plaintiff sought to enjoin as a nuisance a liquor shop on an island in the Mississippi river

east of the boundary between Iowa and Illinois. In holding that the jurisdiction did not exist in the Iowa courts to abate this nuisance, the supreme court of Iowa very clearly state the distinction between the territorial jurisdiction given by congress to the two contiguous states and the concurrent jurisdiction over the river, and, in so doing, use the following language on page 396:

> "It will be observed that the petition in this case seeks to abate a nuisance carried on in a building on an island in the Mississippi river. It is not stated in the petition that the island is within the boundary line of this state, as above defined. Counsel for appellant make the broad claim that the island is part of the river, and that the jurisdiction of this state extends from shore to shore. It will be observed that the concurrent jurisdiction is given to the adjoining states on the river which forms the common boundary. It was held in the case of Gilbert v. Moline W. P. Mfg. Co., 19 Iowa, 319, that the concurrent jurisdiction provided for the adjoining states attaches to cases arising out of the commerce of the river, but does not authorize the courts of Iowa to abate a nuisance established and existing in said river beyond the boundary line of this state. The following pertinent language is employed in the opinion in that case: 'There is an immense commerce on this great common highway. Water crafts, rafts, and boats of almost every kind and description are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made and obligations assumed, for which these boats and crafts may, under certain proceedings, be made liable; injuries

are inflicted upon persons and property by persons while on the river for which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases was made to depend on the inquiry whether the boat or vessel was on one side or the other of the main channel, whether the injury was inflicted or crime committed east or west, or north or south of such line, it can readily be seen that it would be frequently almost impossible to determine such jurisdiction, and that a mistake in this respect would prove fatal to the action or prosecution; and hence the reason of making the jurisdiction concurrent in all such cases. Such property and persons are, as a rule, transitory — moving — here today and gone tomorrow. * * * Not so, however, as to an obstruction where the property and the use thereof is wholly on one side of the channel.' It has never been held that the jurisdiction of this state extends to the east shore of the channel of the Mississippi river in any case except where the act complained of or cause of action was founded upon something connected with the commerce of the river. To hold that it extends to islands and permanent structures or obstructions in the stream beyond the line of the state would, it appears to us, be wholly unwarranted by the act of congress above cited. It was so held in the case cited; and see also Mississippi & M. R. Co. v. Ward, 67 U. S. (2 Black.) 485, 17 L. Ed. 311. And the same rule was recognized and applied in the taxation of a bridge over the Mississippi river at Dubuque, in the case of Dunleith & D. Bridge Co. v. Dubuque County, 55 Iowa, 558. It was not claimed in that case that the part of the

> bridge beyond the middle of the channel of the river was taxable in this state. An island in the river is surely as fixed and definite an object as a bridge; and if an island be without the boundary of the state its courts can have no jurisdiction to abate nuisances maintained thereon nor to punish crime committed on such island. The case of State v. Mullen, 35 Iowa, 199, relied on by counsel for appellant, does not appear to us to be in point. That was an indictmen. for a crime committed upon a boat on the river. It was a water craft and was moved from point to point on the river, although it was at the time resting temporarily on the river, on the east side of the middle of the main channel, and it was aground. It was held that the crime was committed on the river within the meaning of the law conferring concurrent jurisdiction on the adjoining states. It is said in the opinion in that case that 'in the eye of the law a crime committed on the boat under the circumstances is as much an offense perpetrated on the river as though the vessel were at the time afloat.'"

Concurrent jurisdiction, under similar statutes, is also held by the states of Wisconsin and Minnesota over the St. Croix river where it forms the boundary between the states.

Speaking of the nature of this concurrent jurisdiction, the supreme court of Minnesota, in the case of Opsahl v. Judd, 30 Minn. 126, 129, use the following language:

> "Lastly, it is conceded that the casualty occurred on the east or Wisconsin side of the channel of the river. By the legislation of congress, and the con-

stitutions of the states of Wisconsin and Minnesota, adopted in conformity therewith, these states have concurrent jurisdiction on the St. Croix river and its waters. The interstate boundary line is conceded to be the center of the main channel, and the jurisdiction of each state beyond that and opposite the shore possessed by it is limited to the river and its waters. Since each state has accepted and consented to this qualified grant of jurisdiction on the waters of the river within and beyond its boundary line, and incorporated it in its constitution, it is substantially the same as if each had ceded such jurisdiction, and the rights and privileges incident thereto. This doctrine of concurrent jurisdiction was recognized in State v. Dimick, 12 N. H. 194, where the state of New Hampshire had ceded territory to the United States, reserving to the state certain jurisdiction therein. See, also, Commonwealth v. Frazee, 5 Am. Law Reg. (O. S.), 167; S. C. 2 Phila. 191. If there were any question upon principle as to the power of a state thus to grant or accept a qualified jurisdiction, the practice of the state and general governments has too long been recognized and acted on to permit the courts to question the existence or validity of such concurrent but limited jurisdiction. The operation of the general laws of the state, without any express provision therein on the subject, must be co-extensive with its jurisdiction. Sherlock v. Alling, 44 Ind. 184, 193. But beyond its own boundary the courts of each state can only take cognizance of such causes of action as arise upon 'the river and its waters,' and such as are appropriate to the nature of the jurisdiction which the state is entitled

to exercise. We are not called on in this case to accurately define the limits of such jurisdiction, but it would seem clear that the case at bar is within it. If persons while upon the St. Croix river, and navigating its waters, are within the jurisdiction of the state, they should be deemed entitled to the protection of its laws; and the question of a right of action should not be made to depend upon the accident that, at a particular point of time, a boat happened to be in whole or in part on one or the other side of the center of the stream. Sherlock v. Alling, supra; State v. Mullen, 35 Iowa, 199, 203; Gilbert v. Moline Water-Power and Mfg. Co., 19 Iowa, 321, 322; State v. Cameron, 2 Pinney, 490."

In the case of State v. George, 60 Minn., 503, 505, the same court say:

"It is provided by laws 1889, c. LXX (G. S. 1894, §§4835, 4836), that this concurrent jurisdiction shall be exercised by the courts sitting in the counties bordering on the river, and for this purpose the part of the river bordering on each county is attached to that county. Some of the purposes of this concurrent jurisdiction are to enforce proper police regulations on the river, and to regulate and protect interstate traffic on and across the river, and persons engaged in the same. If public travel across the river at this point was carried on by means of a ferry boat, there is no question but that this concurrent jurisdiction would attach during the transit across the river. The fact that the appliance by means of which the

travel is carried on is a bridge instead of a ferry boat does not change the rule. The question here involved is not whether the courts of Minnesota have jurisdiction over this permanent structure on this island considered as real estate, but whether Minnesota and her courts have jurisdiction over the persons and moving or movable vehicles and things on this bridge. In our opinion, it is not material whether, at the time of the occurrence, such persons happen to be over the water of the river, or over an island in the river, or at one side of the main channel or the other. One of the reasons for establishing this concurrent jurisdiction was to prevent the escape of criminals on account of the uncertainty that so frequently arises as to whether the act was committed on one side of the middle of the main channel or the other side of it. This uncertainty exists just as well when the act is committed on a bridge as when committed on a water craft. A traveler on such a bridge is usually not likely to know whether he is over an island or over the water or on one side of the main channel or the other. In our opinion, the court below had jurisdiction."

In an early murder case in Wisconsin, State v. Cameron, 2 Pinney, 490, 495, the supreme court of Wisconsin quote the charge of the circuit judge, and thus approve it:

> "'As to the venue, I think, although it is, so far as I am aware, a new question in our courts, it would be sufficient if it be proven that the mortal wound was given in this county, if the deceased died anywhere upon the Mississippi, within the jurisdiction of this state, and neither above nor below the county line bordering upon the river.'

> "We think the charge of the judge correct. The constitution of the state, article 9, section 1, provides that this state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to this state and any other state or territory."

In the case of J. S. Keator Lumber Company v. St. Croix Boom Corporation, 72 Wis. 62, 95, 7 Am. St. 837, 858, the supreme court of Wisconsin say:

> "Are the words 'concurrent jurisdiction,' as thus used, to be construed as requiring the joint action of both states to give validity to such a charter, or could Minnesota do so alone, with the corresponding right in Wisconsin to grant a similar charter? If such joint action was necessary to give such validity, then the refusal or mere failure of the one state to so act would wholly prevent the exercise of any jurisdiction by either state. 'Concurrent jurisdiction' are words usually applied to two or more courts. When so applied, no one has ever pretended that the exercise of such jurisdiction by the one court was dependent upon its concurrent exercise by any other court. On the contrary, all recognize the authority of each such tribunal to deal with the same subject matter, at the choice of the suitor. This is illustrated by the jurisdiction of state and federal courts in the same territory, as to controversies between citizens of different states, and also as to other matters. They never concur in each other's actions, but each proceeds separately and independently of the other. The

same is true respecting offenses and torts committed upon a river dividing two states, where the courts of each have jurisdiction of the same; for in such case each court must necessarily act separately and independently of the other. Such jurisdiction of the courts of the respective states, when concurrent, extends to the whole of that portion of the river dividing them. State v. Plants, 25 W. Va. 119, 52 Am. Rep. 211; Carlisle v. State, 32 Ind. 55. Although the words 'concurrent jurisdiction' and 'jurisdiction' are usually applied to the rightful authority of courts, yet they are not limited to such use. On the contrary, they are broad enough to embrace also the exercise of both legislative and executive powers. Kendall v. United States, 12 Pet. 623; Sherlock v. Alling, 44 Ind. 184. Thus it is said in the case last cited 'that this state (Indiana) possesses concurrent jurisdiction with the state of Kentucky on the river at the place where the cause of action, if any, arose. The jurisdiction may be exercised in such manner as the state shall elect. It was exercised in unmistakable language in the constitution, by declaring that the state possesses such concurrent jurisdiction, in civil and criminal cases, with the state of Kentucky. The jurisdiction which the state possesses is not limited to the service of process. It is general, and includes the right of legislation touching all civil and criminal cases on the river. * * * The jurisdiction asserted by the constitution is not limited to judicial proceedings in civil and criminal cases. It is such as the state may choose to exercise touching such actions, and legislation is included.' The three co-ordinate branches of the state government

must, necessarily, in their respective spheres, possess powers which are co-extensive with each other. Worcester v. Georgia, 6 Pet. 570.

"The words 'concurrent jurisdiction' must have been used in the compact between the federal government, Wisconsin and Minnesota in the sense in which they had previously been used and were generally understood. When, therefore, by such compact it was in effect provided that each such state shall have 'concurrent jurisdiction' on that portion of the river St. Croix constituting the boundary line between them, it included the exercise of such legislative powers by each state over the whole river as were consistent with the exercise of similar powers over the same portions of the river by the other state. In other words, by such compact each secured to itself such 'concurrent jurisdiction' upon the half of the river within the territorial limits of the other state, by reducing what would otherwise have been its exclusive jurisdiction upon its own half to mere 'concurrent jurisdiction.' The result is that neither of these states could, as against the other, rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession and control of the entire navigable portions of the river."

See, also, the case of Roberts v. Fullerton (Wis. 1903), 93 N. W. 1111.

In 1783, by a compact between Pennsylvania and New Jersey, it was agreed as to the Delaware river "that each state shall enjoy and exercise a concurrent jurisdiction within and upon the water, and not upon the dry land between the shores of said river."

Gen. Stat. N. J. 1896, p. 3472;
Corfield v. Coryell, 4 Wash. C. C. 371, 385; 6 Fed. Cas. 3230, p. 554;
Bennett v. Boggs, Bald. 60-73; 3 Fed. Cas. 1319, p. 227;
President v. Trenton City Bridge Co., 13 N. J. Eq. 46, 50;
Attorney-General v. Delaware & Bound Brook R. R. Co., 27 N. J. Eq., 631, 649.

In State v. Davis, 25 N. J. L. 386, the prisoner was indicted for murder charged to have been committed on a ferryboat on the Delaware river between Philadelphia and Camden. It was not disputed that the state possessed jurisdiction to punish the offense, if committed on the river, but it was held that, by a defect in legislation the courts of Camden county had no jurisdiction on the river. This defect was promptly cured by legislation.

N. J. Pamph. L. 1856, p. 242;
Gen. Stat. N. J. 1896, p. 3475.

In the case of Commonwealth v. Frazee, 2 Phila. 191, it was held by the court of oyer and terminer of the city of Philadelphia that where a defendant was arrested and held to bail in the state of New Jersey for an offense committed on the Delaware river within the concurrent jurisdiction of Pennsylvania, under the agreement of 1783, he can not be held in Pennsylvania for the same offense.

In discussing the question of concurrent jurisdiction, the Philadelphia court say, on page 193:

> "It thus appears that at the time of the commission of the alleged offense, a court of competent

jurisdiction existed in the state of New Jersey, to take cognizance of the offense; and the facts admitted by the demurrer show that the arrest and prosecution of the defendant for the same offense took place in the county of Camden before any proceedings were had in this state. By the arrest and apprehension of the defendant, first in the state of New Jersey, the court, of that state, which, by the laws of that state had jurisdiction of the offense, became entitled, under the agreement of 1783, to the exclusive 'judicial investigation and determination' of the same. No other court in this state could take cognizance of the offense. The defendant can not be called upon to answer in two distinct tribunals for the same offense. And where the jurisdiction of a competent court has attached, no second prosecution can be sustained. No man can be twice legally tried for the same offense."

See, also—

Neal v. Commonwealth, 17 S. & R. 67.

In Commonwealth v. Shaw, 22 Pa. C. C. 414, 8 Pa. Dist. 509, it was decided that by the compact of September 20, 1783, entered into between the states of Pennsylvania and New Jersey, and by the subsequent act of the legislature of Pennsylvania of September 25, 1786, extending the limits of the counties bordering on the Delaware river to the shore of New Jersey, the courts of the counties of Pennsylvania bordering on the Delaware river have jurisdiction of crimes committed on bridges crossing the Delaware river on the New Jersey side beyond the middle of the bed of the river.

In Aitcheson v. The Endless Chain Dredge, 40 Fed. 253, 255, Judge Hughes says:

> "The contention here is as to the jurisdiction over the waters of a public navigable river, lying between two sovereign powers. The title of the United States to the District of Columbia, as now constituted, rests upon a grant and cession made by the state of Maryland. The United States, as to such territory, did not and could not acquire any greater rights, jurisdiction or authority than were possessed by the state of Maryland at the date of such grant and cession. Before the acquisition by the United States of the District of Columbia, the sovereign states of Virginia and Maryland entered into a solemn treaty and convention, by which the navigation and use of and jurisdiction over the river Potomac were mutually settled and determined. The rights of the United States being derived by grant from the state of Maryland, as to that portion of the state of Maryland constituting the District of Columbia, were acquired in subordination to such convention and treaty, which has ever since remained in full force and vigor, and which, in addition, has received the recognition of the congress of the United States. See 20 St. at Large 481. Without reference to said compact, the Potomac river being a great tide-water stream and estuary, presenting in many respects an uncertain boundary between two sovereign states, a concurrent jurisdiction of necessity originally arose over its waters. It has been said by a writer upon American international law that it is 'a principle of American public law that, where the middle of

a navigable river or lake or bay forms the dividing line of states, or an intangible line upon their waters, a concurrent jurisdiction, civil and criminal, arises over such waters to the states upon the opposite shores. It extends over the whole of the dividing waters, unless it was otherwise stipulated, before the adoption of the constitution of the Union, by state compact, or since, by such compact, with the assent of congress.' Gardner's Institutes, 209; Church v. Chambers, 3 Dana 278; Handly's Lessee v. Anthony, 5 Wheat. 374; Carlisle v. State, 32 Ind. 55; Sherlock v. Alling, 44 Ind. 184; People v. Railroad, 48 Barb. 478. The same principle is applied to all cases among nations where their boundaries divide navigable waters. The line being incapable of sight and ready perception, a concurrent jurisdiction must exist on the dividing waters. Gardner's Institutes, 209, 210. Such being the law of nations applicable to states, the following articles of convention and treaty will be found in the compact of 1785 between the contracting states, Maryland and Virginia:

"'1 Rev. Code Va. 1819, p. 53: Sixth. The river Potomac shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said states, trading to or from Virginia or Maryland.'

"It is apparent by the terms of this article of the treaty that each of the parties to the compact was entitled to such authority, jurisdiction and power over the waters of the river Potomac as would en-

> title their respective judicial tribunals to exercise admiralty jurisdiction in said waters."

From the paragraph in Gardner's Institutes quoted from by Judge Hughes, he omitted the following passage:

> "The navigable rivers, bays and great lakes, divided by the boundaries of our republic and the British provinces and Mexico are, by national comity and necessity, subject to such concurrent jurisdiction. In all cases of such concurrent jurisdiction, the state first arresting or prosecuting a party is, by comity, entitled to proceed to final judgment; and that is a bar to any retrial by any other state of our Union for the same cause or offense. The same rule, by national comity, should govern nations thus situated; as our states are municipal sovereignties."
>
> Gardner's Institutes, page 210.

In all of these cases where the right to prosecute for crimes or to enforce civil rights has been exercised beyond the territorial limits, under an authority granted by congress or compact, for the exercise of concurrent jurisdiction, the distinction appears to be observed that the concurrent jurisdiction is simply over the river; and in such matters as affect the bed of the river, or the soil under the river, there is no concurrent jurisdiction, and the reason for this distinction is clearly stated in the Iowa cases.

It has also been held by the Kansas City court of appeals, in the case of Cooley v. Golden, 52 Mo. App. 229, that where a boundary river shifts its course so as to leave the boundary line between the states on dry ground, there is

no concurrent jurisdiction over the old bed of the river, and this is in accordance with sound judgment and with the decisions in the other cases.

These authorities explain the cases arising under questions connected with the taxation of bridges, though these are not entirely unanimous, for bridges rest upon the bed of the river and are permanently annexed to the soil, and, as to them, at least, for all purposes of taxation there is no concurrent jurisdiction, but the boundary line on the bridge is identical with the boundary line beneath it in the bed of the river.

The concurrent jurisdiction is given over the river, not over bridges. The river is shifting and uncertain, and the boundary at all times difficult to ascertain with particularity. A state line on a bridge is readily ascertained, and as to it no uncertainty need exist.

The state of Indiana has never claimed concurrent jurisdiction over bridges. The limit of the jurisdiction claimed is equal right to arrest, of service of process, and to punish crimes committed upon the river.

The same rule is apparent in the case of the Mississippi & Missouri Railroad Co. v. Ward, 2 Black 485, where, the action being brought to abate a nuisance which consisted of a bridge resting upon the bed of a river, it was held that the district court of the United States for the district of Iowa had no jurisdiction as to the bridge beyond the state boundary.

The distinction in reasoning between this case and that of the house boat, in State v. Mullen, 35 Iowa 199, is

clearly drawn in the latter case, and in the later case of Buck v. Ellenbolt, 84 Iowa 394, and need not be further commented on.

In the case of the J. S. Keator Lumber Co. v. The St. Croix Boom Corporation, 72 Wis. 62, 95, 7 Am. St. 837, 858, the obstruction complained of was a part of the bed of a river, and the distinction is observed in that case.

Keeping in view this distinction, there is absolutely no conflict of authority on the question as to jurisdiction over a boundary river and persons and things afloat on it, and all of the cases hold that concurrent jurisdiction over boundary rivers empowers either state to punish crime and to enforce civil rights upon the surface of the stream.

Concurrent jurisdiction means the right of the one or the other to act, and an equal right in each. It would be preposterous, indeed, to hold that it required concurrent action of two states having such jurisdiction over the river to make a murder, committed on the river, a crime, or that it would require the concurrent action of the two states united in one prosecution to punish the crime after it was committed; and it would be equally absurd to hold that where, as frequently occurs, courts of concurrent jurisdiction exist, territorial or otherwise, no suit could be maintained but by the joint process and action of both courts.

In the case of In re Mattson, 69 Fed. 535, in the circuit court of the United States for the district of Oregon, where Oregon and Washington possessed concurrent jurisdiction over the Columbia river, as a boundary between the two states, it was contended that Oregon could prosecute for a violation of its fish laws committed within the territorial

limits of the state of Washington. The court, after reviewing at length many of the authorities, holds that such fishing is not an offense punishable by the state of Oregon, and, on page 542, uses the following language:

> "No comparison can be made between a case like this and cases where the concurrent jurisdiction has been invoked to punish acts that are crimes in themselves, or that are made so by the laws of both states having such jurisdiction. The two states own the bed of the Columbia river upon their respective sides to the middle channel, and the citizens of each within such boundary have a common right of fishing, so long as the navigation of the river is not obstructed. This right is held by the supreme court of the United States to be, not a mere privilege, or immunity of citizenship, but a right of citizenship and property combined, which the state may make exclusive in its own citizens."

As to the general rule of concurrent jurisdiction, however, it says, on page 537:

> "Concurrent jurisdiction between states separated by navigable rivers is an established rule in this government, although in some instances the entire river is within the territorial limits of one state; and in some cases jurisdiction is limited to the execution of the civil and criminal process of each state upon the adjacent waters within the exclusive jurisdiction of the other. 4 Stat. 708 (approving compact between New York and New Jersey). Concurrent jurisdiction is a practical necessity in the administration of government over such rivers."

CONCLUSION.

Every consideration of public policy points to the construction which is claimed by plaintiffs in error for the words "concurrent jurisdiction" in the Virginia compact. It is difficult to protect commerce from depredations wherever it is carried on upon the surface of a stream. River thieves and pirates have been the especial dread of navigators in all times. The policing of boundary streams is one of the most difficult problems of modern government. At the very best it is expensive and inadequate. Property rights should be as safe upon the water as on the land, and yet it is notoriously a fact that they are not.

This is well stated in the dissenting opinion in this case of Judges Hobson and Burnam, Meyler v. Wedding, 107 Ky. 691, 703:

> "There is greater reason for the concurrent jurisdiction on the river where the low-water mark on one side is the line between the states, than where the line is at the center of the stream, for the reason that the state holding to the water edge at low-water mark on its side of the stream would otherwise be practically at the mercy of wrongdoers on the river, and the policing of the stream would be a burdensome tax in many cases on the other state, with little corresponding benefit. Indiana has on the shores of the Ohio the cities of Evansville, New Albany, Jeffersonville, Madison, Lawrenceburg, Aurora, Mt. Vernon, Rockport,

Vevay, Cannelton, Leavenworth, and a number of smaller towns. Concurrent jurisdiction is a practical necessity in the administration of government on the river. Otherwise, the police boats maintained by these cities will be no protection. A thief can sit alongside the wharf boat, in open possession of stolen goods, and the entire people on the north shore of the river will be utterly unable to protect their harbors, landings, or wharves or other property from the army of river tramps, here today, gone tomorrow, leaving no trace behind, and only known to have been present from the stolen valuables that are not to be found. In many years, no practical inconvenience has resulted from the concurrent jurisdiction exercised by Kentucky and Indiana on the river, and there is no reason for the apprehension of trouble in the future that may not be settled by the principles applied in other cases of conflict of laws. It is said that what is lawful on one side of the river may be unlawful on the other, or punished differently. But the same may be true where the center of the stream is the dividing line, and universal experience has vindicated the wisdom of the rule giving both states concurrent jurisdiction in such cases. The two states have concurrent jurisdiction on the river, and neither can by its laws impair or control the jurisdiction of the other. The courts of the state first acquiring jurisdiction of the cause and the parties will retain it, and the courts of the other state will not interfere."

In the case under consideration there are no cities in Kentucky of any size immediately opposite the Indiana

river cities, excepting the cities of Louisville, Owensboro and Henderson. If the concurrent jurisdiction of Indiana is sustained, the Indiana cities can protect themselves, their shipping and their wharves as effectively as they always have done, without expense or any particular burden to the state of Kentucky.

If the concurrent jurisdiction is denied, the burden of their protection, for the good name of the commonwealth, if for no other reason, must be borne by Kentucky alone.

The difficulty of the successful prosecution of crimes committed on the river in interior county seats of Kentucky would be very great, the expense of such prosecutions, which must fall on Kentucky alone, would be burdensome, and it goes without saying that the inability to compel the production of Indiana witnesses would in many cases defeat prosecutions.

A recognition of Indiana's concurrent jurisdiction would take nothing from the jurisdiction and authority of Kentucky nor would it add in any way to the burden of the state government.

The interests of the people in maintaining good government by the vigorous prosecution of crime and such misdemeanors as are common to the criminal statutes of both states, would seem to require that both states should exercise jurisdiction on the river, and to vindicate the wisdom of our fathers in providing for it in the compact.

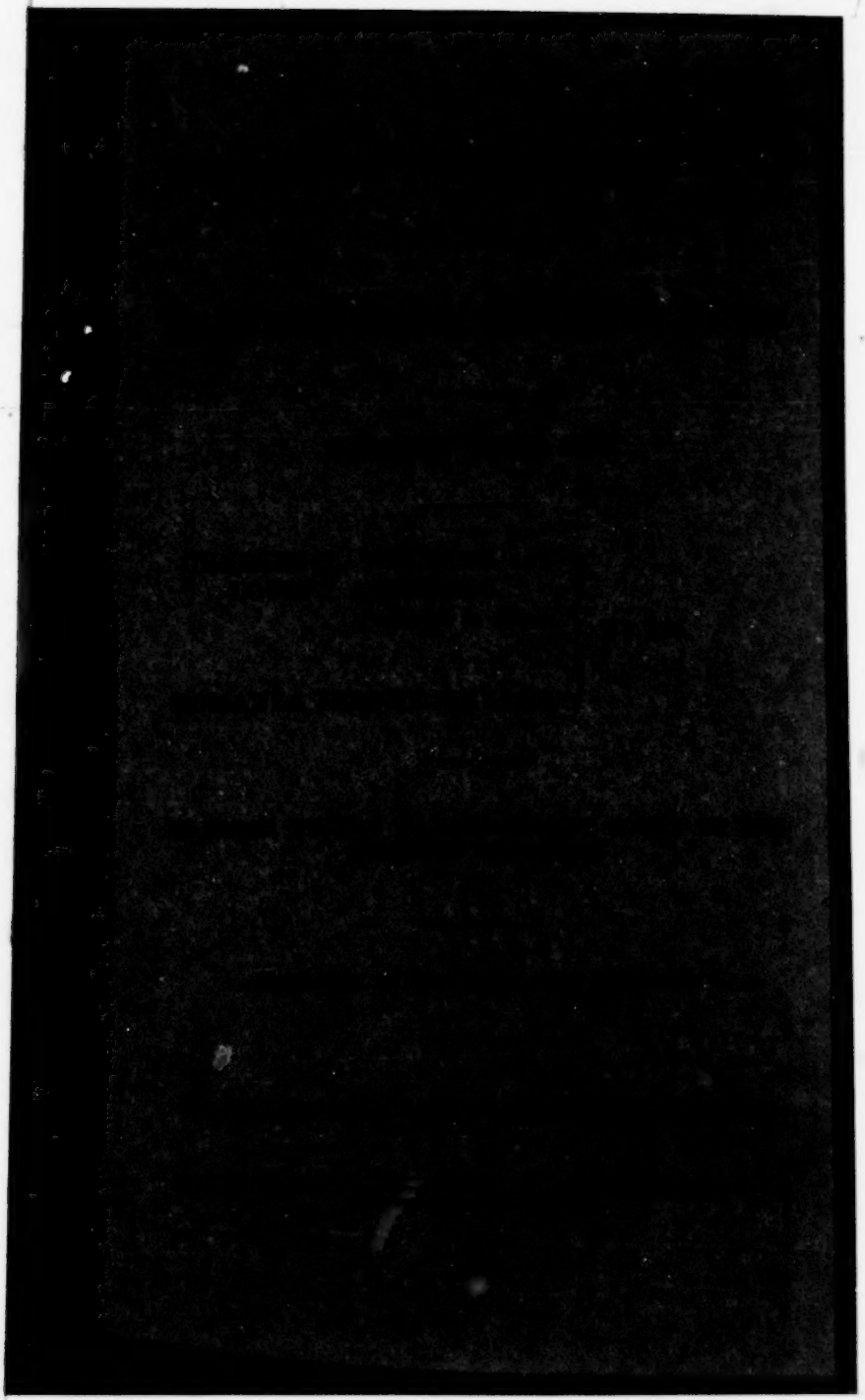
It is submitted that the judgment of the Warren circuit court should be reversed and that that court should be

directed to render judgment upon the verdict in favor of the plaintiffs in error.

Respectfully submitted,

CHARLES W. MILLER,
Attorney-General of Indiana,
For Plaintiffs in Error.

MERRILL MOORES,
CASSIUS C. HADLEY,
Of Counsel for Plaintiffs in Error.



11293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

CHARLES L. WEDDING AND LOUIS I. AHLERING,
Plaintiffs in Error,
v.
ROMANZA JEROME MEYLER.
No. 125.

IN ERROR TO THE WARREN CIRCUIT COURT OF THE STATE OF KENTUCKY.

Appendix of Decisions and Statutes.

TO BE FILED WITH BRIEF FOR PLAINTIFFS IN ERROR.

CONTENTS.

1. Opinion of Kentucky Court of Appeals in Meyler v. Wedding, 107 Ky. 310.
2. Concurring opinion in same case of Judge DuRelle.
3. Dissenting opinion of Judges Hobson and Burnam.
4. Opinion of Supreme Court of Appeals of West Virginia in State v. Faudre, November 14, 1903.
5. Act of Virginia, December 20, 1783, ceding the Northwest Territory to the United States.
6. Deed of Cession of Northwest Territory.
7. Virginia Compact with Kentucky. Act of December 18, 1789.
8. Act of Congress admitting Kentucky, February 4, 1791.
9. Act of Kentucky, as to Ohio river boundary, January 27, 1810.
10. Act of Kentucky, defining boundary of state, February 11, 1820.
11. Certain sections of Kentucky Revised Statutes, 1899.
12. Section 5025, R. S. Ohio, Code of 1853.
13. Illinois Constitution, Article I, §1.
14. Act of Illinois concerning jurisdiction over Ohio river, February 9, 1849.
15. Act of Indiana Territory, September 24, 1803.
16. Act of Indiana Territory, August 15, 1805.
17. Act of Indiana Territory, August 24, 1805.
18. Act of Indiana Territory, December 26, 1815.
19. Act of Indiana, December 27, 1816.
20. Act of Indiana, January 3, 1817 (sections 7 and 11).
21. Act of Indiana, January 28, 1818 (sections 1 and 5).
22. Act of Indiana, January 10, 1818.
23. Act of Indiana, ——, 1820.
24. Act of Indiana, January 31, 1824.
25. Act of Indiana, February 7, 1825.
26. Act of Indiana, December 28, 1829.
27. Indiana Joint Resolution, January 28, 1830.
28. Act of Indiana, January 24, 1831 (section 14).
29. Chapter I, section 2, R. S. Ind. 1843.
30. Constitution of Indiana, article XIV, section 2.
31. Indiana Code of 1852, sections 93 and 96.
32. Certificate of Secretary of State of Indiana and state seal.

COURT OF APPEALS OF KENTUCKY.

[107 KENTUCKY REPORTS, PAGE 310.]

CASE 54—ACTION TO ENFORCE JUDGMENT RENDERED IN INDIANA—NOVEMBER 24.

MEYLER v. WEDDING, ETC.

APPEAL FROM WARREN CIRCUIT COURT.

1. CONSTITUTIONAL LAW—JURISDICTION—STATE LINE.—The jurisdiction of the state of Kentucky extends to low-water mark on the Indiana side, and a judgment rendered by a court of Indiana upon a service of process on the Ohio river south of low-water mark is void.

2. SAME—VIRGINIA COMPACT.—The word "jurisdictions" as used in the eleventh section of the compact with Virginia means legislative jurisdiction for the purpose of keeping the Ohio river open to navigation, and does not convey jurisdiction for the service of civil process.

R. J. MEYLER FOR APPELLANT (WRIGHT & MCELROY OF COUNSEL).

On Jurisdiction: Wood v. Wood, 78 Ky. 624; Gebhard v. Garnier, 12 Bush 324; 26 Am. Rep. 726; Thompson v. Whitman, 18 Wallace 457; Grover & Baker S. M. Co. v. Radcliff, 137 U. S. 287, 670; 2 Black on Judgments, p. 837; Shepherd v. Wright, 59 How. 512; 31 Am. Rep. 322; 31 N. W. R. 477; 4 J. J. Mar. 158; 3 Dana 279; 6 B. Mon. 500; 2 Met. 394; 81 Ky. 196.

JOHN B. RODES, FOR APPELLEES.

On the question of jurisdiction: First, second and third Constitutions of Kentucky; Debates Const. Conv., vol. IV, pp. 4846-4866; Green v. Biddle, 8 Wheat. 1-85; Fowler v. Halbert, 4 Bibb 54; Dembitz, Ky. Jur., p. 17, sec. 6.

[311] BYRON RENFREW ALSO FOR APPELLEE. (JOHN B. RODES OF COUNSEL.)

Additional citations: McFall v. Com., 2 Met. 394; Constitution of Indiana, art. XIV, sec. 222; Sherlock v. Alling, admr., 44 Ind. 184; Pennsylvania v. Wheeling Bridge Co., 13 How. 566; Compact of 1789.

LOUIS I. AHLERING ON THE SAME SIDE. (BYRON RENFREW AND JOHN B. RODES OF COUNSEL.)

Citations: Compact with Virginia, Revised Laws of Va., vol. 1, p. 59; Revised Laws of Kentucky, p. 53; Rev. Stat. of Ind., sec. 222; Carlisle v. State, 32 Ind. 35; Dugan v. State, 125 Ind. 130; S. C. 25 N. E. 171, 9 L. R. A. 321; Welsh v. State, 126 Ind. 71; S. C. 9 L. R. A. 664; 25 N. E. 883; Sherlock v. Alling, 44 Ind. 184; McFall v. Com., 2 Met. [illegible]; Garner's Case, 3 Gratt. 605; Handly's Lessee v. Anthony, 5 Wheat. 374.

(After the decision had been rendered in this case, the court granted specially to the state of Indiana the privilege of being heard in a petition for a rehearing and an oral argument upon same. And thereupon WILLIAM L. TAYLOR, Attorney-General of Indiana, with MERRILL MOORES and CASSIUS C. HADLEY of counsel, filed a brief in which he insisted):

1. That a reversal of the judgment of the Warren circuit court was a violation of the Constitution of the United States in two respects: (a) It tended to impair the Virginia compact, which was a contract of the commonwealth of Kentucky, and thus violated art. I, sec. 10, of the Constitution of the United States as fully as might any act of legislation impair the obligation of that contract; and (b) it denied to the Indiana court and its proceedings the full faith and credit guaranteed by art. IV, sec. 1.

Upon said point counsel made the following citations: Va. Compact of 1789, Ky. Stat. 1894, p. 43; act admitting Kentucky, Ky. Stat. 1894, p. 46; first three Kentucky Constitutions, Ky. Stat. 1894, pp. 52, 62, 78; Fowler v. Halbert, 4 Bibb 54; Church v. Chambers, 3 Dana 278; Arnold v. Shields, 5 Dana 22; McFall v. Com., 2 Met. 398; Louisville Bridge Co. v. Louisville, 81 Ky. 194; Garner's Case, 3 Gratt. 674, 709; State v. Plants, 25 W. Va. 119; Handly v. Anthony, 5 Wheat. 385; Green v. Biddle, 8 Wheat. 85; Penn. v. Wheeling Bridge Co., 13 How. 566; Carver v. Astor, 4 Pet. 101; Hawkins v. Barney, 5 Pet. 457; Charles River Bridge v. Warren Bridge, 11 Pet. 582; McKinney v. Carroll, 12 Pet. 66; Pollard v. Kibbe, 14 Pet. 413; Bronson v. Kinzie, 1 How. 316; Penn. v. Wheeling Bridge Co., 18 How. 432; Lavin v. Savings Bank, 1 Fed. Rep. 655; United States v. [312] New Orleans, 17 Fed. Rep. 488; Griswold v. Bragg, 48 Fed. Rep. 522; Leighton v. Young, 52 Fed. Rep. 444; Wharton v. Wise, 153 U. S. 155; New Jersey v. Wilson, 7 Cranch 164; Providence Bank v. Billings, 4 Pet. 504; Woodruff v. Trapnall, 10 How. 190; Wolff v. New Orleans, 103 U. S. 358; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 672; Vattel Law of Nations, book 1, secs. 203, 204,

295; Constitution of United States, art. 1, sec. 8; Ky. Stats. 1894, secs. 2831, 2852, 3058, 3039, 3290, 3490; Board of Trustees of Falmouth v. Watson, 5 Bush 360; Lutz v. Crawfordsville, 109 Ind. 466; Emerich v. Indianapolis, 118 Ind. 279; Kaufle v. Delaney, 25 W. Va. 410; Flack v. Fry, 32 W. Va. 364; Neal v. Com., 17 S. & R. 67; Coldwater v. Tucker, 36 Mich. 474; Gould v. Rochester, 105 N. Y. 46; Indiana Acts 1830, pp. 180, 182; McFadin v. State, 1 Ind. 557; Indiana R. St. 1843, p. 66; Indiana Constitution 1851, art. 14, sec. 2; 1 Ind. Rev. Stat. 1852, p. 197; 1 Indiana Rev. Stat. 1876, p. 222; Ind. Rev. Stat. 1881, sec. 4207; 2 Ind. Rev. Stat. 1894, sec. 5544; Carlisle v. State, 32 Ind. 55; Sherlock v. Alling, 44 Ind. 184; S. C. 93 U. S. 99; Dugan v. State, 125 Ind. 130; S. C. 9 L. R. A. 321; Welsh v. State, 126 Ind. 71, S. C. 9 L. R. A. 664; Memphis & Cin. Packet Co. v. Pikey, 142 Ind. 304; Gilbert v. Moline Water Power Co., 19 Iowa 319; State v. Mullen, 35 Iowa 199; McGinnis v. Pontiac, 5 McLean, 359; Seven Coal Barges, 2 Biss. 300; The Lewellen, 4 Biss. 156; Ky. Stats. 1894, secs. 1144, 1143, 1146, 1147, 3039; 12 Am. & Eng. Ency. of Law, 296; Rapalje & Lawrence's Law Dict.; Bouvier's Law Dict.; Wiggins Ferry Co. v. Reddig, 24 Ill. App. 265; Opsahl v. Judd, 30 Minn. 129; State v. George, 60 Minn. 505; State v. Cameron, 2 Pinney (Wis.) 495; Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 95; Sanders v. N. O. & St. L. Anchor Line, 97 Mo. 26; Swearingen v. Steamboat Lynx, 13 Mo. 519; State v. Metcalf, 65 Mo. App. 681; State v. Plants, 25 W. Va. 119; State v. Mullen, 35 Iowa 199; Buck v. Ellenbolt, 84 Iowa 394; S. C. 15 L. R. A. 187; Com. v. Frazee, 2 Phila. 365; Cooley v. Golden, 52 Mo. App. 229; Missi. & Mo. Br. Co. v. Ward, 2 Black 483; In re Mattson, 69 Fed. Rep. 535; Indiana v. Kentucky, 136 U. S. 509; Edwards County v. White County, 85 Ill. 392; Constitution of United States, art. I, sec. 10, art. IV, sec. 1.

LOUIS I. AHLERING, WITH J. P. RODES AND BRYON RENFREW OF COUNSEL, FILED A PETITION FOR A REHEARING.

Additional citations: The Norma, 32 Fed. Rep. 411; 12 Am. & Eng. Ency. of Law, 244; 23 Am. & Eng. Ency. of Law, 298; Rorer on Interstate Law, p. 437; Gould on Waters, sec. 71, p. 142; 16 Am. & Eng. Ency. of Law, 258; Aitcheson v. Endless Chain [313] Dredge, 40 Fed. Rep. 253; Gilbert v. Moline, 19 Iowa 321; Com. v. Frazee, 5 Am. Law Reg. (O. S.) 167; S. C. 2 Phila. 191.

In response to the petition for a rehearing JOHN W. RAY, for the appellees [appellant] filed a brief in which he made the following citations: 6 Ohio 505; 6 Blackford 280; Sturgis v. Fay,

16 Ind. 429; Vattel Law of Nations, sec. 203; Story Conflict of Laws, sec. 538; 33 Me. 414; 99 Mass. 207; 1 Cushing 23; 30 Vt. 282; 10 Iowa 375; 47 Iowa 307; 7 Lans. (N. Y.) 388; 4 Paige 425; 7 Watts & S. (Pa.) 451; 8 Mich. 320; 38 Mich. 705; 18 Wallace 307; 141 U. S. 679; 173 U. S. 612; 1 Vroom 29; 5 Wheat. 33; 3 Gratt. 673; 25 W. Va. 139.

(Upon the petitions for a rehearing, the court granted an oral argument which was heard by the full court, and thereupon the petition was overruled; Judge Hobson dissenting.)

JUDGE WHITE DELIVERED THE OPINION OF THE COURT.

This action was instituted on a judgment of the superior court of Vanderburgh county, Ind. Appellant, Meyler, defended upon the ground that the court rendering the judgment did not have jurisdiction to render the judgment. The answer admits that on May 27, 1896, the sheriff of Vanderburgh county, Indiana, handed to appellant a summons directing appellant to appear before the judge of the superior court of the county of Vanderburgh on or before June 8, 1896, to answer a petition of appellees. The answer, however, alleges that this delivery was made in the county of Henderson, this state, and that there was no service of any kind had in the county of Vanderburgh. The answer further alleges that the appellant did not appear in person or by attorney in that action at any time, nor was there ever a trial of the action on the merits. Appellant also denied any indebtedness to appellees on any account whatever. The allegations of the answer were denied by reply. The issue presented was tried before a jury, who were instructed to return special findings, two in number. The first question submitted is: "When the summons in this case was served upon defendant, Meyler [314], on the Ohio river, was said Meyler on the Indiana or Kentucky side of the low-water mark of said river where it touches the Indiana shore?" The jury answered: "On the Kentucky side of the low-water mark."

Question 2: "Did defendant, Meyler, authorize J. E. Williamson to represent him as his attorney for any purpose in the superior court of Vanderburgh county, Indiana, in the suit of L. C. Wedding, etc., v. R. J. Meyler? If so, what was the nature and extent of the authority thus given?" The jury answered: "We do not believe R. J. Meyler authorized J. E. Williamson to represent him as his attorney." The proof showed that summons was served on appellant by the sheriff of Vanderburgh county while appellant was on a steamboat in the Ohio river, and also that appellant never in person appeared in that court. Appellees moved for judgment notwithstanding the special findings by the jury, and the appellant moved for a judgment of dismissal on the findings. The court sustained the motion of appellees, and rendered judgment for the amount of the judgment of the Indiana court. After appellant's motion for a new trial had been overruled, he appeals.

By the proof and special findings of the jury, it appears that appellant did not enter his appearance to the action in Indiana either in person or by attorney, and that at the time summons was served on appellant he was outside of low-water mark on the Indiana shore of the Ohio river, and, of necessity, within the territorial limits of the county of Henderson, Ky. Louisville Bridge Co. v. City of Louisville, 81 Ky. 194; McFall v. Com., 2 Metc. (Ky.) 394; Handly's Lessee v. Anthony, 5 Wheat. 374 [5 L. Ed. 113].

However, it is insisted by counsel for appellees, and evidently this view was held by the trial court, that al[315]though the state of Kentucky owns the soil to low-water mark on the northwestern shore of the Ohio river, the jurisdiction over the river is concurrent in the states bordering thereon; and it is insisted that, by the eleventh section of the enactment known as the "Compact with

Virginia," the states north and west of the river have jurisdiction concurrent with Kentucky over the river.

In the McFall case, supra, this court said: "The word 'jurisdiction,' as applied to a state and as used in the compact with Virginia, imports nothing more than the power to govern by legislation; and, without legislative enactments to enforce and carry out the jurisdiction so conferred, it can not, of itself, be regarded as operative, or effectual to protect the appellant, or to defeat the right of our own tribunals to enforce and execute our own penal and criminal statutes."

Section 221 of the constitution of the state of Indiana, read as evidence, provides, as the boundary of the state, "on the south by the Ohio river from the mouth of the Great Miami river to the mouth of the Wabash river, on the west by a line drawn along the middle of the Wabash river from its mouth to a point where a due north line drawn from the town of Vincennes would last touch the northwestern shore of said Wabash river. * * *"

Section 222 of the constitution reads: "The state of Indiana shall possess jurisdiction and sovereignty co-extensive with the boundaries declared in the preceding section, and shall have concurrent jurisdiction in civil and criminal cases with the state of Kentucky on the Ohio river, and the state of Illinois on the Wabash river so far as said rivers form the common boundary between this state and said states respectively."

The record shows that the superior court of Vander-[316]burgh county that rendered the judgment had jurisdiction of the subject-matter of that action. The only question, therefore, that arises on this appeal, is, did that court acquire jurisdiction of the person of appellant by the service of the summons on him while he was afloat on the river, and south of low-water mark?

Section 11 of the compact with Virginia [13 Hen. St. Va., p. 19], reads: "Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

It appears by the constitution of the state of Indiana, supra, that that state has exercised legislative jurisdiction over the river Ohio, and therefore is entitled to the full benefit of the act of Virginia commonly called "Compact," supra.

We are referred in brief of counsel for appellees to several decisions of the supreme court of Indiana, wherein it is held that that state has concurrent jurisdiction with this state over the river Ohio. We are also referred to decisions of the states of Ohio and Virginia as holding that, by the compact with Virginia, supra, the jurisdiction over the river Ohio is concurrent.

The Virginia court, in Garner's Case, 3 Grat. 655, seems to have held that the Virginia court did not have jurisdiction to try Garner for an offense against the laws of Virginia committed while standing in the water above low-water mark on the Ohio shore; the court holding that [317] the act was committed beyond the territory of the state, although in the water, a minority of the court being of opinion that Virginia jurisdiction and territory extended to the top of the bank on the Ohio side. In a subsequent case, the West Virginia supreme court held the view of the minority in Garner's case, and claimed jurisdiction over the entire river, although the vessel was tied to the Ohio shore. State v. Plants, 25 W. Va. 119 (52 Am. R. 211).

The subject of concurrent jurisdiction between states bordering on a river has frequently come up for adjudication throughout the Union. In 1816 an act was passed by the legislature of Virginia permitting the erection of a bridge across the Ohio river at Wheeling. That privilege was extended by acts till 1847. In 1849 the state of Pennsylvania brought an action in the supreme court of the United States, seeking an injunction against the maintenance of the bridge, because the same obstructed navigation. The court, on preliminary hearing (Pennsylvania v. Wheeling & B. Bridge Co., 9 How. 647, 13 L. Ed. 294), made an order appointing a commissioner to take proof as to the obstruction, if any, by the bridge. Subsequently (13 How. 518, 14 L. Ed. 249), upon final hearing, it was adjudged that the bridge obstructed navigation, and would have to be removed or raised, and an order was entered to that effect. In the opinion rendered in that case, it was admitted that there was ample authority to erect a bridge; that the act of the Virginia legislature gave ample authority, but that the bridge obstructed navigation, and thereby violated its charter, even were it not for the acts of Virginia ceding to the whole people the free and unobstructed navigation of the Ohio river.

The case was again before the court in 18 How. 421, 15 [318] L. Ed. 435. It there appeared that, subsequently to the former opinion, congress had declared the bridge not to be an obstruction to navigation, and had provided that all vessels should be so regulated as not to interfere with the bridge. The former order (13 How. 518, 14 L. Ed. 249), was annulled.

The court said: "We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of congress to

regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government."

By the compact entered into between the states of New Jersey and Pennsylvania in 1783, it is declared that the river Delaware, * * * in the whole length and breadth thereof, is and shall continue to be and remain a common highway, equally free and open for the use, benefit and advantage of the contracting parties, and that each state shall enjoy and exercise concurrent jurisdiction within and upon the water between the shores of said river. Attorney-General v. Delaware & B. B. R. Co., 27 N. J. Eq. 631. This concurrent jurisdiction was held to mean that neither state could, without the consent of the other, grant exclusive privileges on the river. President, etc., River Delaware Bridge v. Trenton City Bridge Co., 13 N. J. Eq. 46. It was conceded that the boundary was the center of the stream. [319.]

In the case of Attorney-General v. Delaware & B. B. R. Co., 27 N. J. Eq. 631, the court, after quoting from 13 N. J. Eq. 46, says: "The practice thus mentioned shows that the legislature has usually, when exercising its concurrent jurisdiction, under its interstate agreement, with the view of providing for the construction of bridges over this river, employed language that imported an authority to cross the river from shore to shore. And justly, too: for though its authorization was not alone sufficient, as it has not exclusive jurisdiction, yet, as it possessed jurisdiction of some sort over the whole of the waters, for the purpose of guarding the common highway, its permission

was needed throughout by whomsoever claimed the right to interfere at all with this public privilege. Hence it is a perfectly proper use of language to speak of the railroads of New Jersey as crossing the Delaware under the sanction of her laws."

The constitution of the state of Wisconsin (article 9, section 1), declares: "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to the state, and any other state, or territory, now or hereafter to be formed, and bounded by the same."

This same provision is also found in the constitution of Minnesota, and is also contained in the enabling acts authorizing the two states. The legislature of Minnesota chartered the St. Croix Boom Corporation, and authorized it to erect booms in the river St. Croix. This was done on that part of the St. Croix river forming a part of the boundary line between the states of Wisconsin and Minnesota. There was no similar grant by the state of Wisconsin. In an action for damages, in which the boom corporation justified under its authority from Minnesota [320] the supreme court of Wisconsin held, in a very elaborate opinion, that the state of Minnesota had power, under its concurrent jurisdiction clause, to grant the charter, at least as to its half the river. J. S. Keator Lumber Co. v. St. Croix Boom Corporation, 72 Wis. 62 (7 Am. St. R. 837, 38 N. W. 529).

Among other things, that court said, in discussing the opinion of the United States supreme court in the Wheeling & B. Bridge Co. Case, 18 How. 421, 15 L. Ed. 435: "It must be conceded, however, that the power and jurisdiction of Virginia over the half of the river most distant from it was greater than it otherwise would have been, by reason of the terms and conditions upon which it parted with its title to the territory northwest of the Ohio."

There are numerous cases where the question of concurrent jurisdiction, as applied to rivers forming a boundary line between states, has arisen, and in these cases it has been almost universally held that that provision in the several compacts and acts means legislative jurisdiction to control the river, and the free use thereof, for purposes of navigation. However, we are not without authority as to the jurisdiction of the states as regards civil and criminal jurisdiction of its courts over the rivers forming boundary lines.

The river Mississippi is the boundary line between the states of Iowa and Illinois, and, by an act of the legislature of Iowa, the Mississippi & Missouri Railroad Company was authorized to erect a bridge on the river at Rock Island, and by a like act of the state of Illinois, the Chicago & Rock Island Railroad was authorized to bridge the Mississippi river at Rock Island. Under the two legislative acts, a bridge was built—one entire structure, consisting of six piers with a draw. There were three piers [321] on the Iowa side of the middle of the river, and likewise three piers on the Illinois side. One Ward, the owner of a line of steamboats running on that part of the river between St. Louis, Mo., and St. Paul, Minn., brought his action in the United States court for the district of Iowa, seeking to have the bridge removed on the ground of a public nuisance, as an obstruction to the free navigation of the river. The case went to the supreme court, and was there decided. M. & M. Railroad Co. v. Ward, 2 Black 485, 17 L. Ed. 311. The court said: "The constitution of Illinois calls for the middle of the Mississippi river as the western boundary of that state, and, as Iowa was admitted into the Union after Illinois, a line in the middle of the river is the dividing line between the states. The complainant sued in the federal court because of his citizenship

in a different state from the defendant; and the United States district court holden in Iowa could have exercised the same jurisdiction that a state court of Iowa could have exercised, and no more. It had no power beyond the middle of the river. On that part of the bridge within Iowa and its piers the court below acted, and ordered that the structure should be removed. * * * It was at the long pier, and in the Illinois draw east of that pier, that the complainant's boats sustained the injuries on which he founds his right to sue the Iowa corporation, and to proceed against the bridge in rem as a public nuisance. An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the courts of Illinois, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to the complainant's boats, giving him the privilege to sue and abate the obstruction, was as local as the public right to indict. He asks nothing from the person of the defendant, but seeks [322] to remove a local object, because he has sustained special damage from that object. The district court had no power over the local object inflicting the injury, nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside the case."

This position taken by the court as to jurisdiction is emphasized by a dissenting opinion of Mr. Justice Nelson, concurred in by Justices Wayne and Clifford. The dissenting opinion does not claim jurisdiction for the court of Iowa upon any concurrent idea, but, as said, "upon much higher and broader ground. The right to a free and unobstructed navigation of this river on the part of the public, and especially of the citizens of the United States, depends upon the constitution and the laws of the United States,—

the public law of the country." Mr. Justice Nelson's dissent (2 Black 497, 17 L. Ed. 316).

The enabling act of the state of Illinois (3 Stat. 429, section 2), says: "Provided, also, that the said state shall have concurrent jurisdiction with the state of Indiana on the Wabash river, so far as said river shall form a common boundary to both, and also concurrent jurisdiction on the Mississippi river, with any state or states to be formed west thereof, so far as said river shall form a common boundary to both."

The enabling act of Iowa provides (5 Stat. 743, section 3): "And be it further enacted, that the said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said river shall form a common boundary to said state and any other state or states now or [323] hereafter to be formed or bounded by the same; such rivers to be common to both."

Thus it is clear that, by the very highest authority, the states of Iowa and Illinois were given concurrent jurisdiction over the river Mississippi; yet, by the decision of the supreme court, it was held that the courts of Iowa could not exercise jurisdiction beyond the middle of the river,—its boundary.

It is noticeable that, in the enabling act of Illinois, that state is guaranteed concurrent jurisdiction over the rivers Mississippi and Wabash; yet as to the river Ohio, forming a part of its boundary, the same as that river forms a part of the boundary of Indiana,—low-water mark on the northern shore,—there is no mention of concurrent or other jurisdiction.

In the enabling act of Indiana (3 Stat., 289, section 2), it reads: "Provided, also, that the said state shall have concurrent jurisdiction on the river Wabash with the state

to be formed west thereof, so far as the said river shall form a common boundary to both." The only authority under which Indiana can claim concurrent jurisdiction over the river Ohio, is by reason of the compact with Virginia. That part of the compact relating to the river Ohio and jurisdiction thereon is section 11, supra.

The concurrent jurisdiction therein guaranteed to the states owning the northwestern shores of the river Ohio has always been considered by the state of Illinois to be legislative only, and that state has never, so far as we are informed, assumed to its courts jurisdiction beyond its territorial limits. The rights of the state of Illinois must be the same as of the state of Indiana.

We are of the opinion, clearly, that concurrent jurisdiction, as granted by the compact with Virginia, meant only that [324] the states should have legislative jurisdiction. This was done, as it seems to us, to insure to each state, and to the citizens of the United States, the free and unobstructed navigation of that river. In other words, concurrent jurisdiction was given and retained, so that neither state, against the wish of the other, or without the consent of the other, could authorize the construction of a bridge across the river, and so that each state could grant ferry privileges and wharfing privileges, and regulate fishing therein, and such other rights common to both, and necessary to be under a common supervision of both, to make the waters of the river Ohio a common, public, free and unobstructed highway for purposes of navigation. It is a universal rule that the jurisdiction of all states is limited by their territorial boundaries. To make an exception to this rule requires an express stipulation. It is against all rules and precedent of law to grant to another state jurisdiction over the territory of a state, and, if it be conceded that it can be done, it will never be by implication. If any

grant be made, it should always be held to be the least power that the words of the grant covers.

We realize that the courts of Indiana claim concurrent jurisdiction over the river Ohio, and that our opinion here is in conflict with that of the supreme court of Indiana; but we prefer to follow the opinion of the supreme court of the United States in this matter, especially when it agrees with our ideas on the subject. Louisville Bridge Co. v. City of Louisville, 81 Ky. 189.

The constitution of Indiana, under which this concurrent jurisdiction is claimed, only gives or declares jurisdiction on the Ohio "so far as said rivers (Ohio and Wabash) form the common boundary between this state and said states respectively." The Wabash river forms [325] the common boundary between the states of Indiana and Illinois, and, by the enabling acts of both states, concurrent jurisdiction is given over the Wabash. The Ohio river is not the common boundary between the state of Indiana and this state. The boundary line is the low-water mark on the northwest, or Indiana side. Indiana v. Kentucky, 136 United States 479 (10 Supreme Court 1051, 34 L. Ed. 329). So that, if the letter of the constitution of Indiana be looked to alone, it does not declare that the courts of that state have jurisdiction, except on rivers forming the common boundaries thereof, which can not and does not include the river Ohio. We are therefore of opinion that the superior court of the county of Vanderburgh, Indiana, did not acquire jurisdiction of the person of appellant by the service of summons on him while on the river and on this side of low-water mark, and by the verdict of the jury this was all the service ever had on appellant. The judgment sued on is therefore void, and judgment upon the verdict should have been rendered for appellant.

For the reasons indicated, the judgment is reversed and cause remanded, with direction to render judgment on the verdict dismissing the action, and for proceedings consistent herewith.

The whole court sitting.

A separate concurring opinion was subsequently delivered by Judge DuRelle; and a dissenting opinion by Judge Hobson, in which Judge Burnam concurred. These opinions may be found at the end of this volume.

II

[685] The following separate concurring and dissenting opinions were not delivered at the time of the original opinion:

MEYLER v. WEDDING. APPEAL FROM WARREN CIRCUIT COURT.

SEPARATE CONCURRING OPINION BY JUDGE DURELLE.

In my view, there are other reasons for the decision rendered in this case than those stated in the opinion. I shall state them in as brief a manner, and as little incumbered by citation of authority as possible.

The question presented is, whether process from a court of Indiana may be served upon the Ohio river south of low-water mark. The settlement of this question depends upon the construction given to the peculiar phraseology of section 11 of the compact between Kentucky and Virginia (13 Hen. St. Va. 19). That provision is:

"Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the ter[686]ritory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state, on the river aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

This can not be a grant to any state upon the northern shore of the river, for no such state existed. There was no being in esse answering the description to take such a gift. But if it be the proper construction that, by this provision, a trust was created for the benefit of a state thereafter to be created upon the northern shore, and by this language Kentucky was made trustee to hold the title until such creation, it may be that the contention of appellees may be sustained.

But in construing this section it should be borne in mind that it was one part only of the legislation and action whereby Virginia disposed of her imperial domain. And it must be construed as being in pari materia with the resolution of the Virginia legislature relating to the cession of the Northwest Territory, the deed of cession, the ordinance of 1787 by congress accepting the grant, the amendment of the deed of cession at the request of congress, and the acts of congress admitting Kentucky, Indiana, Illinois, and Ohio into the Union as states. In none of these statutes or deeds is there to be found any language indicating the slightest intention on the part of Virginia to grant, or the faintest idea upon the part of the general government that it obtained, for itself or any other body politic, any jurisdiction, concurrent or otherwise, over the Ohio river south of low-water mark.

When Virginia granted to the general government the [687] territory northwest of the river, it retained the territory as far as low-water mark on the northern side, and consequently retained all jurisdiction to that boundary, for jurisdiction follows boundary. By the compact, the soil as far as that boundary was ceded to Kentucky, and jurisdiction as far as that boundary went with the grant of the territory, except in so far as jurisdiction may have been reserved in the grant. The compact was approved De-

cember 18, 1789, by both states. By laws enacted in 1791-92 Kentucky was admitted into the Union as a state, according to the provisions of the compact. By the terms of the grant, which were simultaneously accepted by the grantee, it was provided—first, that the navigation of the river, so far as the territory of the proposed state, or the territory remaining within the limits of the grantor, lies thereon, shall be free and common to the citizens of the United States; and, second, that the respective jurisdictions of Virginia and Kentucky on the river should be concurrent only with the states which may possess the opposite shores of said river. This does not mean at all the same thing as a provision that the jurisdiction should be only concurrent with such states. That would be a limitation upon the jurisdiction which Kentucky acquired by the compact. The language used is a stipulation that no other body politic, except those states possessing the opposite shores, should be permitted to have concurrent jurisdiction with Kentucky over the river. It was an agreement that the general government, to which the Northwest Territory had just been ceded, should not have, in exercising territorial government over that domain, concurrent jurisdiction with Kentucky over the river. The jurisdiction was to be concurrent only with such states as might thereafter possess the opposite shores [688]. This was not a limitation upon Kentucky's jurisdiction. It was an inhibition against parting with it. It gave the territory, and with it the jurisdiction, to low-water mark on the northern shore. And it provided that Kentucky should not cede concurrent jurisdiction over the river to the United States, exercising territorial government over the Northwest Territory, or to any other state than those which might possess the opposite shore.

Where, then, do the states to the north of the Ohio obtain jurisdiction, if this construction of the compact be correct? Jurisdiction by one sovereign over territory admitted to be the property and within the boundary of another, is not to be lightly implied, and surely not from language so vague and uncertain as that used in the compact upon this point.

The congress of the United States has invariably, in its action, recognized this construction as correct.

In 1802, Ohio was admitted as a state, and its boundary fixed at the Ohio river. No concurrent jurisdiction was granted, and of course no territory extending over the river, for the general government had no territory extending over the river. In 1816 Indiana was admitted. The boundary of its territory was fixed on the west at the middle of the Wabash river, and on the south by the Ohio river, and it was further provided "that the said state shall have concurrent jurisdiction on the river Wabash, with the state to be formed west thereof, so far as the said river shall form a common boundary to both." But no grant is found here of concurrent jurisdiction over the Ohio. In 1818 Illinois was admitted, and its territory bounded by the middle of the Wabash river, the middle of the Mississippi river, and the Ohio river. These acts show that the federal government did not assume that the three states to the north had concurrent jurisdiction with [689] the state of Kentucky over the Ohio. In 1820 Virginia declared the Ohio river lying opposite her was to be considered as comprehended within the bodies of several of her counties, subject to the provisions of the compact with Kentucky. Code Va., p. 50. Ten years before Kentucky had enacted a statute to the same effect. If the federal government had concurrent jurisdiction, it did not sur-

render it by the act which admitted Indiana as a state. That state derived its whole existence from the federal government, and can claim no right from any other source. Kentucky could not, by a compact with Indiana, grant concurrent jurisdiction without the consent of the general government.

Ohio has never adopted any legislation claiming concurrent jurisdiction over the river, nor has such jurisdiction ever been expressly asserted by its courts. So with Illinois, which has never claimed jurisdiction until the constitution of 1848, if then. The constitution of 1818 fixed the boundaries according to the act admitting the state into the Union, but in the constitution of 1848 it is provided:

"This state shall exercise such jurisdiction upon the Ohio as she is now entitled to, or such as may be agreed upon by this state and the state of Kentucky."

It is obvious that the jurisdiction Illinois was then entitled to was as far as low-water mark on the northern shore. The same provision contained in the Illinois constitution of 1848 is embraced in the constitution of 1870.

The preamble of the Indiana constitution of 1816 states that it is formed consistent to the act of congress enabling the people of the Indiana territory to form a state. There is here no claim of concurrent jurisdiction. Nor [690] is there one in the ordinance adopted by the first constitutional convention accepting the boundaries as fixed by congress. That constitution (art. 5, §2) fixes the jurisdiction of the supreme court with the limits of the state. But in the constitution of 1851, 35 years after the beginning of its existence as a state, it asserted its claim to concurrent jurisdiction with Kentucky.

I shall not take time to consider the cases in the supreme court of the United States further than to say that the question has never there been decided.

Nor is it profitable to consider the cases of concurrent jurisdiction depending upon the grants embodied in the acts of congress.

A claim of jurisdiction by one state over the land of another must be supported by some grant, or the claim fails. Kentucky has never granted to Indiana any jurisdiction over the Ohio river, concurrent or otherwise. It is beyond her power as limited by the constitution to do so. U. S. Const., article I, section 10. If such jurisdiction in Indiana exists, it must be by the virtue of the language of the compact, which to that end must be construed as creating a sort of springing use of jurisdiction for the benefit of states unborn. No stretch of construction can avail to extract from the language of the compact an implication which will give to a state not a party to the instrument, and not in being at the time of its execution, jurisdiction over the territory and within the boundary of another sovereignty, so as to authorize the grantee by implication to serve process and make arrests upon the territory of the other, and try offenders for acts committed upon foreign soil or to impose penalties for acts which are not prohibited by the owner of the territory.

"There must be accurate and express treaty stipulation [691] between the contracting parties to confer extra-territorial jurisdiction." (Vattel, Law Nat., 6th Am. ed. 120.)

"Sovereignty united with domain, establishes jurisdiction." (Vattel, p. 165.)

For the additional reasons given here, I concur with the opinion of the majority.

III

DISSENTING OPINION BY JUDGE HOBSON.

The question involved in this case is whether the process from the courts of Indiana may lawfully be served by her officers on the Ohio river.

In January, 1781, Virginia, by an act of her legislature, ceded to the United States all right she had to the territory "northwest of the river Ohio." In December, 1789, another act, now known as the "Compact with Virginia," was passed under which the territory then styled the "District of Kentucky" was permitted, under certain conditions, to be formed into an independent state. Under these acts, the boundary line between Kentucky and the states lying northwest of the Ohio is the low-water mark on the northwest side of the river. Handly v. Anthony, 5 Wheat. 374; Indiana v. Kentucky, 136 U. S. 329.

Ordinarily, the laws of a state and the authority of its officers to execute its process are confined to its territorial limits, but the seventh condition of the compact with Virginia is this (sec. 11 of Compact):

"That the use and navigation of the river Ohio so far as the territory of the proposed state or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdictions of this commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the river."

[692] Since this act was passed, that part of Virginia which still bordered on the Ohio river has been formed into the state of West Virginia. The words, "The proposed State," refer to Kentucky. The words, "river as

aforesaid," refer to that part of the river which was included in the act. The word "only" is used in the last clause because, though the use and navigation is to be free to all the states, the concurrent jurisdiction on it was to be confined to the states possessing the opposite shores. The copula "and," connecting the two clauses of the sentence, shows that the last clause is not a limitation on the first, but an additional condition annexed to the grant.

The meaning of the sentence is therefore (1) that the use and navigation of the Ohio, so far as the territory of West Virginia or Kentucky lies thereon, shall be free and common to the citizens of the United States; (2) that the respective jurisdictions of West Virginia and Kentucky on the river shall be concurrent with the states alone which possess the opposite shores.

The question to be determined, so far as this case goes, is: What concurrent jurisdiction is thus vested in Kentucky and Indiana on the Ohio?

The original opinion is based upon the ground that only concurrent legislative jurisdiction is conferred. But by what authority can the general term "jurisdictions" be curtailed in this way, when there is nothing in the act to sustain such a construction? The power to make laws would be of no value without the power to enforce them. The words, "respective jurisdictions of this commonwealth and of the proposed state," can not naturally be understood as including only the legislative branch of the government. This court might with equal propriety declare that only executive jurisdiction is meant as to say [693] that these terms include only legislative jurisdiction; for there is nothing in the act to warrant one limitation upon the natural meaning of the words, "respective jurisdictions," rather than another.

In the separate concurring opinion filed upon the reargument of the case this view is apparently abandoned, and I am not sure that I understand the ground clearly upon which the court means to rest its judgment; but, as I understand that opinion, it holds that the words quoted are not a limitation upon Kentucky's jurisdiction; that the territory, and with it the jurisdiction to low-water mark on the northern shore, is vested in Kentucky, and that it is inhibited against parting with it, or ceding concurrent jurisdiction over the river to the United States, or to any other state than those which might possess the opposite shores. This seems to be only another way of stating a proposition urged with great earnestness in the earlier discussions of the case. It was urged that the concurrent jurisdiction referred to relates alone to the use and navigation of the river, or, in other words, to maritime jurisdiction. It was insisted that the stipulation was directed mainly at the federal government, to prevent the extension of the admiralty jurisdiction of the federal courts, which subsequently took place. It has also been argued that the act, being a compact between Kentucky and Virginia, confers no rights except upon Kentucky.

All these propositions stand or fall together. The fundamental objection to them all is that, if this were the meaning of the act, it would only have referred to that part of the Ohio river lying along the Kentucky border; for if only an inhibition upon Kentucky was meant, or if rights were granted only to Kentucky, or if the aim was [694] to fence off the federal government, then there was no reason for defining in the act the rights of the states in that part of the Ohio river which did not border upon Kentucky. Another fundamental objection to either of these views is that the act of 1789 was passed just after the adoption of the constitution of the United States, and be-

fore it had become firmly established. The act is a transcript of the two previous acts, one of which was passed five years before, when the constitution of the United States had not been formed, and when the legislature of Virginia could not possibly have had any of these things in mind.

The great old commonwealth that had given an empire to the federal government, and furnished it a large part of the talent that shaped its early history, had no such narrow purpose in view. These far-seeing men intended the Ohio river to be the boundary between the states bordering upon it, and to be a common highway for all the states. They foresaw that the territory thus ceded would one day be a center of population, and that the great river would be dotted with towns and cities, and a great thoroughfare of commerce. At common law the respective jurisdictions on either side of a highway were concurrent on it. This rule, which the experience of ages had confirmed as necessary to secure peace and protect life and property among their ancestors, was well known to the people of Virginia, and the great statesmen who controlled her affairs intended to establish the same rule for the highway which had hitherto been exclusively within the jurisdiction of Virginia. Had it been intended by Virginia to retain her jurisdiction as it then stood, there was no need to mention in the act that part of the river which it left within her territory. And, if it had [695] been intended to confer upon Kentucky exclusive jurisdiction to low-water mark on the northern shore, there was no need to mention the states possessing the opposite shores, for this jurisdiction would have passed with the grant of the soil.

The restriction of the concurrent jurisdiction to the states possessing the opposite shores is, of necessity, a grant of concurrent jurisdiction to both of them; for the exclu-

sion of all others is by necessary implication an inclusion of these states. It can not fairly give one of them an exclusive jurisdiction. The purpose of the act was to enable the states on both banks to protect their people from the evil-minded on the river, which was made a common highway for everybody. The natural meaning of the words is that "the respective jurisdictions" of Virginia on the river as they then existed should continue in Virginia and Kentucky, and be exercised by them concurrently with the states possessing the opposite shores. The clause in question is by the express terms of the act made a condition of the grant of the territory to Kentucky. By plain terms, the respective jurisdictions of Virginia and Kentucky on the river are placed on the same footing as the respective jurisdictions of the states opposite them.

The three acts passed by the Virginia legislature on the subject should be read together, and in construing them we should bear in mind the situation at the time. The title to the Ohio river was in Virginia. There was no one to dispute her right. Having the whole title and the power to dispose of it, she enacted these statutes, having in view that which would best promote the settlement and prosperity of the vast area that was then dependent on the Ohio river as its only outlet. Her inten[696]tion was not only to guarantee to the people of the states possessing the opposite shores the free use of this great waterway, then so essential to them, but to clothe these states with power to protect persons on the river in life, liberty, and property. Otherwise, the use and navigation of the river might be substantially destroyed, and become a menace to society on either shore.

The congress of the United States was granted no power over the river, and it was therefore not mentioned in any of the acts of congress admitting into the Union the

states of Kentucky, Indiana, Ohio and Illinois, for the rights of these states in the river passed to them directly from Virginia, and the general government had nothing to grant. The Wabash, Missouri, and Mississippi rivers stand on wholly different ground, for these lie in the territory ceded to the general government, and could be regulated by congress, and only by it.

The position that the words of the act are too vague to constitute a grant of jurisdiction to the states possessing the opposite shores of the river, has, so far as I have seen, no judicial sanction. In Handly v. Anthony, 5 Wheat. 377, the United States supreme court, by Chief Justice Marshall, speaking of the act ceding the Northwest Territory, and the compact with Virginia, above referred to, said:

"It was intended, then, by Virginia, when she made this cession to the United States, and most probably when she opened her land office, that the great river Ohio should constitute a boundary between the states which might be formed on its opposite banks. This intention ought never to be disregarded in construing this cession."

"The compact with Virginia, under which Kentucky became a state, stipulates that the navigation and juris[697]diction over the river should be concurrent between the new states and the states which may possess the opposite shores of the said river. This term seems to be a repetition of the idea under which the cession was made."

In Church v. Chambers, 3 Dana, 274, this court, sustaining the Kentucky statute forbidding the exportation of slaves on the Ohio, said:

"The Ohio river, as far as it is a boundary of this state, is within its jurisdiction. The eleventh article of the compact with Virginia only guarantees to the citizens of all the states 'free and common use and navigation of the

river,' and to 'the states possessing the shores opposite to Virginia and Kentucky a concurrent jurisdiction.'

"A state having a concurrent jurisdiction of the Ohio river may certainly pass laws for preventing crimes and torts upon it without denying in the least degree, to every citizen of the United States, equal right to the use and navigation of it, according to the full spirit and policy of the guaranty in the compact. And therefore Kentucky had a right to declare that the abduction of slaves, or the deportation or transportation of them, in vessels on the Ohio river, within her jurisdiction, without the consent of the owners, and to their damage, should be unlawful."

Again, in Arnold v. Shields, 5 Dana, 22 [30 Am. Dec., 669], the court, by Chief Justice Robertson, said:

"Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial, and executive—as that possessed by Kentucky, over so much of the Ohio river as flows between them; and consequently, neither of them can, consistently with the compact, exercise any author-[698]ity over their common river so as to destroy or impair or obstruct the concurrent rights of the other."

Though this was not strictly necessary to the decision of the case before the court, it will be seen from the opinion that it is not one of the matters on which it reserved its judgment. It therefore shows the construction then placed by the court on the compact, and should not, after so many years, be departed from.

The question was again presented in McFall v. Commonwealth, 2 Met. 394, where an Ohio magistrate, who was convicted for marrying a couple on the Ohio river contrary to the Kentucky statute, relied on the provisions of the compact giving concurrent jurisdiction to the states possess-

ing the opposite shores. The court, holding the defense not made out, said:

"It does not appear from the admissions or proofs before referred to that the defense charged was committed within the jurisdiction of 'Cincinnati township,' or within the jurisdiction of the State of Ohio; for the record contains no statute or other valid evidence showing that the latter state has ever assumed or claimed or asserted jurisdiction, exclusive or concurrent, over the place where the offense is proved to have been committed. The appellant has claimed exemption from the penalties imposed by the laws of the commonwealth within whose limits he violated those laws, and has invoked the protection which, he claims, is afforded by the laws of another state, but has failed to show that any such laws exist. The word 'jurisdiction,' as applied to a state, and as used in the compact with Virginia, imports nothing more than the power to govern by legislation; and, without legislative enactments to enforce and carry out the jurisdiction so conferred, it can not, of itself, be regarded as operative [699] or effectual to protect the appellant, or to defeat the right of our own tribunals to enforce and execute our own penal and criminal statutes." It will be observed that in none of these cases was there a suggestion of the restricted view of the compact now taken by this court. In this case it appears that Indiana has asserted the jurisdiction conferred on her by the compact. It is provided in the constitution of the state that it "shall have concurrent jurisdiction in civil and criminal cases with the state of Kentucky on the Ohio river" (section 2, article 14), and this provision is enforced in several statutes. The courts of Indiana have steadfastly maintained this jurisdiction. Thus, in Carlisle v. State, 32 Ind. 55, the conviction of two men for murder on the Ohio river was sustained. The court said:

"The court below refused to charge the jury that if they believed from the evidence that the acts charged were committed on the Ohio river below low-water mark they should acquit.

"The boundary of Spencer county, on the Ohio river, *extends no farther* than low-water mark. Cowden v. Kerr, 6 Blackf. 280; Stinson v. Butler, 4 Blackf. 285; Handly's Lessee v. Anthony, 5 Wheat. 374."

"The boundary in Kentucky, opposite to the county of Spencer, extends to low-water mark, on the Indiana side of the Ohio river. McFall v. Commonwealth, 2 Met. (Ky.) 394."

The court here quotes section 11 of the compact with Virginia, and certain sections of the constitution and statutes of Indiana. It then adds:

"By force of these provisions, the court of the county of Spencer has concurrent jurisdiction with the courts of Kentucky over crimes committed on the Ohio river." [700.]

This case was followed in Dugan v. State, 125 Ind. 130, 9 L. R. A. 321, where a judgment fining a steamboat pilot for violating the Indiana Sunday law, by carrying on the Ohio on Sunday, a Sunday excursion, was affirmed; and in Welsh v. State, 126 Ind. 71, 9 L. R. A. 664, where the same rule was followed for a violation on the river of the Indiana laws forbidding the sale of whiskey without license.

The same view has been taken in West Virginia. In State v. Plants, 25 W. Va. 119, 52 Am. Rep. 211, a conviction was sustained for selling spirituous liquors without license, where it appeared the sale was made from a boat tied up at the Ohio bank, 30 yards within the low-water mark, and therefore within the territorial limits of the state of Ohio. The court said:

"We are in this case prepared to hold that the jurisdiction of West Virginia is co-extensive with the water of the Ohio river, while it is confined within its banks, and that the state, in the proper county, has jurisdiction of offenses committed on a boat afloat on the Ohio river, while confined within its banks, whether such boat is or is not fastened to some object on the bank. If this were not so, our citizens might with impunity violate our revenue and other laws. But, without regard to the consequences that might follow, if the state did not possess such jurisdiction, Virginia, which confessedly owned, before the cession, the territory through which the Ohio river runs, did not cede away her jurisdiction over the waters of the river, no matter what the stage was, so long as it was confined within its banks."

The same rule obtains where a river separates two states, the thread of the stream being the dividing line, and by the act of congress concurrent jurisdiction is given [701] to both on the river. Thus, the middle of the Mississippi river is the line between Illinois and Missouri, and each is given "concurrent jurisdiction over the river" with the other. A collision occurred on the river east of the middle line, and it was insisted that it was not, therefore, covered by the Missouri statute, but it was held otherwise. The court said:

"Jurisdiction, as applied to a state, signifies the authority to declare, and the power to enforce, the law, as well as the territory within which such authority and power may be exercised. Those were its meanings in the language from which we derived the word, and are its present meanings in our own.

"The jurisdiction of a state is co-extensive with its sovereignty. By conferring 'concurrent jurisdiction,' congress intended by the act in question to declare that, sub-

ject to the other laws of the United States, transactions occurring anywhere on that river between the two states might lawfully be dealt with by the courts of either according to its laws, and that where a court of one state assumed jurisdiction in a particular case the same should be exclusive therein until relinquished." (Sanders v. St. Louis & New Orleans Anchor Line, 97 Mo. 26, 3, L. R. A. 390.)

The same view is taken in Illinois, Wiggins Ferry Co. v. Reddig, 24 Ill. App. 265.

The center of the Mississippi is also the line between Iowa and Illinois, both having concurrent jurisdiction on the river. In State v. Mullen, 35 Iowa, 199, the defendant had been convicted of keeping a house of ill fame on the river, and contended that the Iowa courts had no jurisdiction, because the boat was anchored east of the middle line of the stream, and therefore within the boundary of [702] Illinois. The court held otherwise, following the previous case of Gilbert v. Moline W. P. & Manufacturing Co., 19 Iowa, 319, where the court said:

"There is an immense commerce on this great common highway. Water crafts, rafts, and boats of almost every kind and description are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made and obligations assumed for which those boats and crafts may, under certain proceedings, be made liable. Injuries are inflicted upon persons and property by persons while on the river for which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases was made to depend on the inquiry whether the boat or vessel was on one side or the other of the main channel, whether the injury was inflicted or crime committed east or west or north or south of such line, it can be readily seen that it would frequently be almost impossible to determine such jurisdiction, and that

a mistake in this respect would prove fatal to the action or prosecution, and hence the reason of making the jurisdiction concurrent in all such cases. Such property and persons are, as a rule, transitory, moving here today, and gone tomorrow."

The same rule was applied on a charge of keeping a gaming house, where it appeared that the boat was kept on the west or Kansas side of the Missouri river, the thread of the stream being the dividing line between the two states, and both being given concurrent jurisdiction on it. (State v. Metcalfe, 65 Mo. App. 681.)

So on the St. Croix, the center of which is the dividing line between Wisconsin and Minnesota, both having concurrent jurisdiction on the river. (Opsahl v. Judd, 30 Minn. 129; State v. George, 60 Minn. 505; State v. Cam-[703]eron, 2 Pinney 495; Keator Lumber Co. v. St. Croix Boom Co., 72 Wis. 95 [7 Am. St. R. 837]).

A number of other like authorities might be cited, but it is unnecessary, as there is no conflict. The cases involving islands, bridges, dams or other permanent structures resting on the soil are based on the ground that these things follow the soil, and the concurrent jurisdiction is only on the river. This distinction is well sustained by authority. The case of Attorney-General v. D. & B. Railroad Company, 27 N. J. Eq. 631, M. & M. Railroad Company v. Wood, 2 Black 435, and Keator Lumber Co. v. St. Croix Boom Co., 72 Wis. 62 (7 Am. St. R. 837), cited in the opinion, are not, therefore, in point. The opinion in Garner's Case, 3 Grat. 655, was placed by some of the judges on the same ground, as the defendant was standing on the soil, and was held, therefore, not "on the river."

There is a greater reason for the concurrent jurisdiction on the river where the low-water mark on one side is the line between the states than where the line is at the

center of the stream, for the reason that the state holding to the water edge at low-water mark on its side of the stream would otherwise be practically at the mercy of wrongdoers on the river, and the policing of the stream would be a burdensome tax in many cases on the other state, with little corresponding benefit. Indiana has on the shores of the Ohio the cities of Evansville, New Albany, Jeffersonville, Madison, Lawrenceburg, Aurora, Mt. Vernon, Rockport, Vevay, Cannelton, Leavenworth, and a number of smaller towns. Concurrent jurisdiction is a practical necessity in the administration of government on the river. Otherwise the police boats maintained by these cities will be no protection. A thief can sit alongside the wharf boat, in open possession of stolen goods, and [704] the entire people on the north shore of the river will be utterly unable to protect their harbors, landings, or wharfs or other property from the army of river tramps, here today, gone tomorrow, leaving no trace behind and only known to have been present from the stolen valuables that are not to be found.

It is said that what is lawful on one side of the river may be unlawful on the other, or punished differently. But the same may be true where the center of the stream is the dividing line and universal experience has vindicated the wisdom of the rule giving both states concurrent jurisdiction in such cases.

In many years no practical inconvenience has resulted from the concurrent jurisdiction exercised by Kentucky and Indiana on the river, and there is no reason for the apprehension of trouble in the future that may not be settled by the principles applied in other cases of conflict of laws. The two states have concurrent jurisdiction on the river, and neither can by its laws impair or control the jurisdiction of the other. The courts of the state first

acquiring jurisdiction of the cause and the parties will retain it, and the courts of the other state will not interfere.

No question of conflict of law arises in this case. The only question is, whether the judgment of the Indiana court is void for want of jurisdiction, because the process on which it was based was served on the Ohio river.

For the reasons indicated, it seems to me the court below properly held the judgment valid, and that the construction now adopted by this court for the first time, over a century after the act was passed, denies it fair effect and is unwarranted by the authorities. I therefore dissent from the judgment of the court.

Judge Burnam concurs in this opinion.

IV

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

STATE v. FAUDRE.

1. The state of Ohio has right to establish ferries on the Ohio side of the Ohio river and to fix their charges for ferriage over that river from Ohio to West Virginia.

2. West Virginia can not punish one who acts under a ferry franchise given by the state of Ohio to operate a ferry from its side of the Ohio river over that river, for charging one coming from Ohio more than is allowed by West Virginia law for ferriage over that river.

From Mason county. Brannon, judge. Reversed and dismissed. November 14, 1903.

Brannon, Judge:

Bert Faudre was indicted in the circuit court of Mason county for charging C. E. Winger ten cents for ferriage of himself from Gallipolis, in the State of Ohio, over the Ohio river to the West Virginia side, contrary to the order of the county court of Mason county fixing five cents as the

charge. The case was tried by the court in lieu of a jury, and the court found Faudre guilty and fined him $10. As I understand the evidence the defendant was operating the ferry under ferry franchise conferred by the Virginia legislature in 1796, and re-enacted in 1819. He justified this charge under an ordinance of Gallipolis establishing a ferry "from the end of Court street" in that city, "across the Ohio river to the Virginia shore," and a license from the city to operate the ferry, the ordinance allowing the ten cents charge, he operating under this license also.

The Ohio is a great navigable river dividing the states of Ohio and West Virginia, a public highway open to all. Unless an exception to the general rule, we must apply the general rule, which is, that "a state has the right to grant the exclusive right to ferry from its shores across a navigable river between two states." 16 Am. & Eng. Ency. Law 1091; Cooley, Con. Lim. 731. "In the case of boundary rivers, like the Mississippi, a ferry franchise conferred by a single state is valid without the concurrent sanction either of congress or of the state upon the opposite side of the river, or the right of landing beyond the limits of the state by which the grant is made." Gould on Waters §35; Conway v. Taylor, 1 Black 603; Gear v. Bull., 34 Ill. 74. To say that a state has not this right to give its people facility of departure would detract from its sovereignty and be of great detriment. A ferry need not own land on both sides. Conway v. Taylor, 1 Black 603. The point of departure is the seat, the base, the home of the ferry. Sistersville Ferry Co. v. Russell, 52 W. Va., 43 S. E. 107. "A ferry is in respect of the landing place, and not of the water. The water may be to one, the ferry to another." 13 Viner Abridg. 208 A; Conway v. Taylor, cited. Thus, as the Ohio ferry had a foothold presumably on the end of Court street, Gallipolis, it was a lawful ferry. Under this

rule no state can prohibit another from granting a ferry right. Under its franchise the boat can depart, and the stream being a highway, it can navigate its waters, and it can land on the opposite shore and can not be prevented by the state on the opposite shore. It can not land on private property without consent, but it has right to land at a public wharf, paying reasonable wharfage. In carrying persons and property it is engaged in interstate commerce, and its landing could not be prohibited or taxed, though it may be made to pay wharfage. The landing is a necessary part of the act. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Cannon v. New Orleans, 20 Wall. 577; Newport v. Taylor, 16 B. Monroe, 784; Trans. Co. v. City, 107 U. S. 691. The right to have a ferry includes the right to land. The right to land is incidental to the right to navigate a public river. It is said that "the grant of a ferry franchise across a river between two states gives only the right to ferry from the shore of the state granting the franchise." 13 Am. & Eng. Ency. L. 1092; Well v. Chapman, 2 Iowa 524; Gear v. Bullerdick, 34 Ill. 74.

But it is said that these principles apply only where the boundary of the opposite states is the middle of the river, giving each state indisputable jurisdiction over the shore and half the river, and that such is not the case with the Ohio river, for the reason that when Virginia granted to the Union the Northwest Territory her grant conveyed the territory "situate, lying and being to the northwest of the river Ohio." Great difference of opinion has been expressed as to whether this reserved to Virginia jurisdiction to low or high water mark on the west side of the Ohio. In State v. Plants, 25 W. Va. 119, it was held that "the jurisdiction of West Virginia is coextensive with the water while confined within its banks." In Ravenswood v. Fleming, 22 W. Va. 52, it was held that "the bed, banks and

shores of the Ohio river are held by the state in trust for the public." This would give West Virginia title to the top of the bank on the Ohio side. The first constitution of this state claims the state's jurisdiction to include "so much of the bed, banks and shores of the Ohio river as heretofore appertained to the state of Virginia;" whilst the second declared without reserve that the state "includes the bed, bank and shores of the Ohio river." But, of course, we have no more than Virginia had. Nor could the constitution confer greater title than in law existed. In Bridge Co. v. Pt. Pleasant, 32 W. Va. 331, I expressed the opinion that our territory extended to the low-water mark. I cited Garner's case, 3 Grat. 655, in support of this statement. In that case, fourteen Virginia judges sitting in the general court were greatly divided and delivered exhaustive opinions, the decision by the majority holding in effect that low-water mark was Virginia's western line. The actual decision imports that. So the supreme court of the United States has several times held. Handly's Lessee v. Anthony, 5 Wheat. 374, the great Chief Justice Marshall, a Virginian, delivering the opinion. In Indiana v. Kentucky, 136 U. S. 479, and Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 612, it was again so held. These cases involved the boundary line of Kentucky; but as Kentucky was formed from Virginia after the grant of the northwest territory, she has the same western boundary, and these decisions apply. Kentucky has uniformly held the low-water mark. McFall v. Commonwealth, 2 Metc. 394, 396. Indiana likewise, Carlisle v. State, 32 Ind. 55. Ohio holds that her territory extends at least to low-water, if not to the middle. Booth v. Shepherd, 8 O. S. 243.

The chief argument for the line of the top of the bank on the Ohio side is the definition of a river. "A river is a

running stream of water pent in on either side by banks, shores or walls." "A freshwater river, like a tidal river, is composed of the alveus or bed, and the water, but it has banks instead of shores. The banks are the elevations of land which confine the waters in their natural channel when they rise the highest and do not overflow the banks; and in that condition of the water, the banks and the soil which is permanently submerged, form the bed of the river." Gould on Waters, §§41, 45. For the other side it may be said that to confine Ohio to the top of the bank would deprive her of necessary state powers, such as the erection of wharves and other facilities, as well as police control of her border, and refuse to her necessary state power, and detract from her sovereignty. As will be seen in Handly v. Anthony, cited, Chief Justice Marshall, was influenced by considerations of great inconvenience to the new states that were to be formed out of this cession by Virginia. Virginia, by act of January 2, 1781, made it a condition of her grant that new states should be formed out of the territory granted, and it can not be readily supposed that she intended to deprive such new states of the usual powers of states bounding on public rivers, and cramp their faculties by stopping their jurisdiction at the top of the river bank. It does seem to me that as the constitution of the Union gives to the national supreme court jurisdiction in controversies between states, and its decision must be final, the rulings of that court must be accepted as law. That court has exclusive jurisdiction touching boundary between states. Virginia v. West Virginia, 11 Wall. 39. I shall not pursue this question, as I know that I can shed no more light upon it additional to that reflected by the great arguments in the cases cited. If the low water line be the line, there can be no question that Ohio has the right to establish ferries on her shore and to

fix rates from the Ohio to the West Virginia shore. We do not say that greater charge could or could not be made from the West Virginia shore to the Ohio shore, as it is not involved. But we are not driven to say, as decision, whether State v. Plants is sound law. We can decide this case on another ground. After Virginia made the deed ceding to the republic the northwest territory, congress passed the celebrated historic ordinance for the government of the territory "northwest of the river Ohio," providing that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, duty or imports thereon." Virginia, by act Dec. 20, 1788, referred to this ordinance and declared that "the aforerecited article of compact between the original states and the people and states in the territory of the Ohio river, be and the same are hereby ratified and confirmed, anything to the contrary in the deed of cession of the territory by this commonwealth to the United States notwithstanding." If otherwise before, would not this act accord to Ohio full use of the Ohio river in such modes as rivers are commonly used, among them the power to establish and regulate ferries having their seats on the Ohio side? That is not all. In the Virginia act providing for the formation of Kentucky it is declared "that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdiction of this commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the

states which may possess the opposite shores of the said river." How far does the concurrence of jurisdiction of West Virginia and Ohio go? What is meant by it? It is only necessary and proper in this case to say that it goes far enough to give Ohio power on her shore, whatever the line under the deed, to authorize a ferry and govern it by regulations. This concurrence of rightful jurisdiction over the Ohio would seem to give ferries on the Ohio side right to carry both ways, and charge according to Ohio law. This compact of Virginia, on which Kentucky was admitted by congress into the Union, has been held to be national law by the supreme court. Pennsylvania v. Wheeling Bridge Co., 13 How. 519; Henderson Bridge Co. v. Henderson, 173 U. S. 610. I find that in Arnold v. Shields, 5 Dana 22, and in Newport v. Taylor, 16 B. Monroe, p. 787, it is said of this compact: "Jurisdiction unqualified being, as it is, the sovereign authority to make, decide on and execute laws, a concurrence of jurisdiction must entitle Indiana to as much power—legislative, judicial and executive, as that of Kentucky over so much of the Ohio river as flows between them; and consequently neither of them can consistently with the compact exercise any authority over their common river, so as to destroy, impair or obstruct the concurrent rights of the other."

The word jurisdiction, as here used, must be wide. Why should it be confined to any one of the three agencies of jurisdiction, legislative, executive or judicial? In J. S. Keator L. Co. v. St. Croix Boom Co., 72 Wis. 62, 7 Am. St. R. 837, this "concurrent jurisdiction" under said congressional provision is discussed, and it is given broad construction, in holding that one state may under it allow a boom hindering navigation on the other side. It may be doubted whether that is such an exercise of power as is lawful, because permanently affecting the right of the

other state. "The state of Indiana possesses concurrent jurisdiction with the state of Kentucky for the enforcement of civil and criminal law on the Ohio river, where the two states possess the opposite shores." Sherlock v. Alling, 44 Ind. 184. The court said Indiana's legislation covered the river.

It is only necessary for us to say now that Ohio had power to authorize a ferry and fix a charge for a person coming from its shore. The dividing line is one thing, concurrent jurisdiction is another thing. Kentucky, though having the same line as West Virginia, has always conceded to states on the Ohio opposite right to establish and regulate ferries, and has held that her laws do not apply to them. Newport v. Taylor, 16 B. Monroe, 699; Reeves v. Little, 7 Bush 469. See Gear v. Bullerdick, 34 Ill. 74. How can our law govern a ferry created by Ohio? After writing to this point, pursuing the matter of concurrent jurisdiction accorded states on the west of the Ohio, by Virginia, I find that congress in admitting Illinois provided that its western line should be the middle of the Mississippi river, and that "said state shall have concurrent jurisdiction * * * on the Mississippi river with any state or states to be formed west thereof." In Wiggins Ferry Co. v. Reddig, 24 Ill. App., held that "neither Illinois nor Missouri can exercise exclusive jurisdiction over any part of the Mississippi, nor is either confined in the exercise of its own jurisdiction to the middle thereof. The two states exercise concurrent jurisdiction on the river for all judicial purposes." In matters to which this concurrence applies the state which first assumes retains jurisdiction of a matter to the exclusion of the other. In State v. Mullen, 35 Iowa 199, the court interpreted this concurrence to give Iowa power to try a crime done on a boat near the Illinois shore. But the same court in Buck v. Ellen-

bolt, 15 L. R. A. 187, denied power in the state to abate a nuisance on an island east of the middle line, saying it was not on the river. But it said in all matters touching commerce on the river the state had concurrent jurisdiction over the whole river. As shown above, a ferry boat is an instrument of commerce and interstate commerce. Where two states bound on a river there is concurrence over the whole stream without compact. Aitcheson v. Endless, etc., 40 Fed. 253, 16 Am. & Eng. Ency. (1 ed.) 258. By reason of this concurrent jurisdiction, regardless of the line, the decision that Plants was guilty in State v. Plants, cited, was right, as he sold liquor on a boat lying in the water of the Ohio.

It is immaterial that the charge was collected from Winger after leaving the Ohio side.

The fact that the Virginia franchise authorized ferriage both ways would not derogate from the right of Ohio to establish a ferry.

If it would change the result that the defendant was acting under the Virginia franchise before he got the Ohio license it does not appear which he accepted first.

After further examination of the question involved in this case, I find it settled by the decision of the supreme court of the United States, as also by the Kentucky supreme court in Conway v. Taylor, 1 Black 603. A Kentucky ferry sought an injunction against an Ohio ferry to prevent its ferriage both ways over the Ohio river, claiming exclusive right to do so under the Kentucky ferry grant. The lower state court awarded a total injunction, thus forbidding the Ohio ferry from ferrying either from Kentucky to Ohio or from Ohio to Kentucky. The Kentucky supreme court reversed this decree, and modified the decree of the lower court by limiting the injunction so as to prevent the Ohio ferry only from ferrying from Ken-

tucky to Ohio. It thus recognized the full right of the Ohio ferry to ferry from Ohio to Kentucky. It conceded the right to ferry if "authorized to transport from the Ohio shore from a ferry established on that side under the laws of that state," but held that the Kentucky grant gave exclusive right to ferry from the Kentucky shore (see page 628). The supreme court of the U. S. affirmed this decision, conceding as beyond dispute the right of Ohio to establish a ferry upon its soil, saying that "the concurrent action of the two states is not necessary to the grant of a ferry franchise on a river that divides them. A ferry is in respect of the landing, not the water; the water may be to one, the ferry to another." Here the water is a public navigable way, and who disputes Ohio's right to the bank of the river? Owning the bank she may attach a ferry to it. The federal supreme court further said, in speaking of the Kentucky law and decision, "The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. She has thrown no obstacles in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation and of no complaints by any of those states. It was shown in argument at bar that similar laws exist in most, if not all, the states bordering upon these streams. They exist in other states of the Union bounded by navigable waters." In this extract, and in the whole opinion, the supreme court concedes and recognizes the right of Ohio to establish and regulate ferries on its bank of the Ohio. The Kentucky court, though it had statutes prohibiting apparently any ferriage from the Ohio shore except under a Kentucky franchise, refused to apply those acts to an Ohio ferry, and so did the national supreme court. How could it be other-

wise considered alone under the compact made by Virginia upon the admission of Kentucky into the Union? That compact makes the Ohio a public highway and gives concurrent jurisdiction over it to all states bordering on it, and deprived Virginia of exclusive jurisdiction over it. Wheeling bridge case, 13 Howard 518. Yet in this case Faudre was fined for charging a passenger going from Ohio to West Virginia, not from West Virginia to Ohio.

The decisions cited above were based on the compact between Virginia and Kentucky; but when we consider the later Virginia act, Code 1849, chapter 1, section 32, it is still plainer. Virginia thereby again ratified that compact by asserting jurisdiction for herself "subject to the provisions contained in the articles of compact between Virginia and Kentucky hereinafter mentioned." See section 6. Our code claims for this state jurisdiction over the Ohio "where there is no statute or compact to the contrary." Chapter 1, section 2. This recognizes the concurrent jurisdiction conceded by that compact.

Under such concurrent jurisdiction granted by Virginia it would seem to me that Ohio could grant a ferry valid to carry from both sides of the Ohio; but that is only a suggestion of my own, and not involved in the case. It has been remarked that this doctrine would enable Ohio to ruin every West Virginia ferry. What of it? We can not help it. It is the result of lawful competition in business unde authority of law. It would redound to the public interest in cheapness of ferriage. Trapp Co. v. Standard Oil Co., 50 W. Va. 611.

In Crop v. Hopkins, 6 W. Va., the validity of a ferry grant by Ohio is recognized, though the subject is not discussed.

"And in case of boundary rivers like the Mississippi a ferry granted by a single state is valid without the sanction

of congress or the state which bounds upon the opposite shore of the river, or the right of landing beyond the limit of the state by which the grant is made." Gould on Waters, sec. 35. I think the case of Memphis v. Overton, 3 Yerg. 387, sustains the foregoing view. See 16 Munn, 784, 787.

In McFall v. Com., 2 Metc. 394, a man was fined for celebrating marriage on a boat on the Ohio; but the court conceded that if Ohio had passed a law to authorize the minister to marry, and had thus exercised concurrent jurisdiction with Kentucky, there could be no conviction. Under these principles West Virginia ferry rates apply only to West Virginia ferry franchises, and Faudre was not subject to them.

Having taken up this case again I have just noticed that in Garner's Case, 3 Gratt. 655, Judge Johnston said: "I conclude, therefore, that Virginia has exclusive jurisdiction to low-water mark on this side of the river, and Ohio has exclusive jurisdiction on the other, while over the permanent river they both possess concurrent jurisdiction; the ultimate property in the whole river to low-water mark on the Ohio side remaining in Virginia." Here is properly conceded concurrent jurisdiction. The soil on which the river runs is West Virginia soil to low-water mark on the Ohio side; but the water flowing over it is subject to concurrent jurisdiction of both states for certain purposes. It is this concurrent jurisdiction that rules this case. Above I have stated what it means. I add other authorities. Concurrent is "running together; having the same authority; thus we say such and such courts have concurrent jurisdiction, that is, each has the same jurisdiction." Bouv. Law Dic. "By conferring 'concurrent jurisdiction' congress intended to declare that transactions occurring anywhere on that river, between

the two states, might lawfully be dealt with by the courts of either according to its laws. Where a court of one state assumed jurisdiction in a particular case it would be exclusive until relinquished." Sanders v. N. O. & St. L. Anchor Line, 97 Mo. 26. See State v. George, 60 Minn. p. 505; Opsahl v. Judd, 30 Minn. p. 129; Memphis v. Pikey, 142 Ind. 304; Welsh v. State, 126 Ind. 71, 9 L. R. A. 64; Meyler v. Wedding, 60 S. W. 20. Rorer on Inter-State Law, 337, lays down correct law: "The existence of concurrent jurisdiction in two states over a river that is a boundary between them vests in each of such states, and its courts, except as to things permanent, and except as to maritime and commercial matters cognizable by the national government and its courts, jurisdiction both civil and criminal, from shore to shore of all matters of rightful state cognizance occurring upon such river in all parts thereof where it forms such common boundary." Observe, that it says that this concurrent jurisdiction applies to "all matters of rightful state cognizance occurring upon such river in all parts thereof."

Now, is not the establishment and regulation of a ferry a matter of rightful state cognizance? Indeed, is it not a right of navigation? Can you deny that to a state on the Ohio river? Is it not a means of commerce on the water of the river? Can you deny the right of commerce?

Observe, that there is a difference between the soil or ground over which the Ohio runs, and its flowing water. The soil and things permanent in or attached to it, a bridge, for instance, are not subject to Ohio jurisdiction; but a boat used in ferriage is not such; a thing floating on the water. Many cases draw this distinction, holding that where there is concurrent jurisdiction in two states upon a river, a state has no power over soil or things fixed in it beyond its line; but as to things not such, but transi-

tory, floating upon it, both have common concurrent powers. The late well considered case of Roberts v. Fullerton, 93 N. W. 1111, in the supreme court of Wisconsin, shows this distinction. There it is held that as to soil and things attached, the concurrent jurisdiction does not extend; but as to things having relation to the water, things transitory or floating upon it, it does fully extend. Mississippi v. Ward, 2 Black 485. Judge Taliaferro, in Garner's Case, 3 Gratt. 655, said it refers "only to things afloat." Surely both states may establish and regulate ferries over the Ohio.

For these reasons we set aside and reverse the finding and judgment of the circuit court, and find the defendant not guilty and that he be discharged from the indictment and go thereof without day.

V

ACT OF VIRGINIA, DECEMBER 20, 1783.

[11 HENING'S VA. ST. AT LARGE, 326.]

AN ACT to authorize the delegates of this state in congress to convey to the United States, in congress assembled, all the right of this commonwealth to the territory northwestward of the river Ohio.

I. Whereas the congress of the United States did, by their act of the 6th of September, in the year 1780, recommend to the several states in the Union, having claims to waste and unappropriated lands in the western country, a liberal cession to the United States of a portion of their respective claims, for the common benefit of the Union:

II. And whereas this commonwealth did, on the 2nd day of January, in the year 1781, yield to the congress of the United States, for the benefit of the said states, all right, title, and claim, which the said commonwealth had to the territory northwest of the river Ohio, subject to the conditions annexed to the said act of cession:

III. And whereas the United States, in congress assembled, have, by their act of the 13th of September last, stipulated the terms on which they agree to accept the cession of this state, should the legislature approve thereof—which terms, although they do not come fully up to the propositions of this commonwealth, are conceived, on the whole, to approach so nearly to them, as to induce this state to accept thereof, in full confidence that congress will, in justice to this state for the liberal cession she hath made, earnestly press upon the other states claiming large tracts of waste and uncultivated territory, the propriety of making cessions equally liberal, for the common benefit and support of the union:

Be it enacted by the General Assembly, That it shall and may be lawful for the delegates of this state to the congress of the United States, or such of them as shall be assembled in congress, and the said delegates, or such of them so assembled, are hereby fully authorized and empowered, for and on behalf of this state, by proper deed or instrument in writing, under their hands and seals, to convey, transfer, assign, and make over unto the United States, in congress assembled, for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction, which this commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the northwest of the river Ohio, subject to the terms and conditions contained in the before recited act of congress of the 13th day of September last, that is to say: Upon condition that the territory so ceded shall be laid out and formed into states, containing suitable extent of territory, not less than 100 nor more than 150 miles square, or as near thereto as circumstances will admit: and that the states so formed shall be distinct republican states, and admitted members of the federal Union, having the same rights of sovereignty, freedom and independence as the other states; that the necessary and reasonable expenses incurred by this state, in subduing any British posts, or in maintaining forts or garrisons within and for the defense, or in acquiring any part of the territory so ceded or relinquished, shall be fully reimbursed

by the United States; and that one commissioner shall be appointed by congress, one by this commonwealth, and another by those two commissioners, who, or a majority of them, shall be authorized and empowered to adjust and liquidate the account of the necessary and reasonable expenses incurred by this state, which they shall judge to be comprised within the intent and meaning of the act of congress of the 10th of October, 1780, respecting such expenses. That the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties. That a quantity not exceeding 150,000 acres of land, promised by this state, shall be allowed and granted to the then Colonel, now General George Rogers Clarke, and to the officers and soldiers of his regiment, who marched with him when the posts of Kaskaskies and St. Vincents were reduced, and to the officers and soldiers that have been since incorporated into the said regiment; to be laid off in one tract, the length of which is not to exceed double the breadth, in such place on the northwest side of the Ohio as a majority of the officers shall choose, and to be afterwards divided among the said officers and soldiers in due proportion, according to the laws of Virginia. That, in case the quantity of good lands on the southeast side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee river, which have been reserved by law for the Virginia troops upon continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said troops in good lands, to be laid off between the river Scioto and Little Miami, on the northwest side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia. That all the lands within the territory so ceded to United States, and not reserved for or appropriated to any of the before mentioned purposes, or disposed of in bounties to the offi-

cers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever. Provided, that the trust hereby reposed in the delegates of this state shall not be executed unless three of them, at least, are present in congress.

VI

DEED OF CESSION FROM VIRGINIA, MARCH 1, 1784.

[11 HENING'S VA. ST. AT LARGE, 571.]

To all who shall see these presents, we, Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, the underwritten delegates for the commonwealth of Virginia, in the congress of the United States of America, send greeting:

Whereas, the general assembly of the commonwealth of Virginia, at their sessions begun on the 20th day of October, 1783, passed an act entitled "an act to authorize the delegates of this state in congress to convey to the United States, in congress assembled, all the right of this commonwealth to the territory northwestward of the river Ohio," in these words following to wit:

[Here follows the act of cession.]

And whereas, the said general assembly, by their resolution of June 6, 1783, had constituted and appointed us, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, delegates to represent the said commonwealth in congress for one year, from the first Monday in November then next following, which resolution remains in full force:

Now, therefore, know ye, that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Mon-

roe, by virtue of the power and authority committed to us by the act of the said general assembly of Virginia, before recited, and in the name and for and on behalf of the said commonwealth, do, by these presents, convey, transfer, assign, and make over, unto the United States, in congress assembled, for the benefit of the said states, Virginia inclusive, all right, title and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio, to, and for the uses and purposes and on the conditions of the said recited act. In testimony whereof we have hereunto subscribed our names and affixed our seals, in congress, the first day of March, in the year of our Lord 1784, and of the independence of the United States the 8th.

TH. JEFFERSON, (L. S.)
S. HARDY, (L. S.)
ARTHUR LEE, (L. S.)
JAMES MONROE. (L. S.)

Signed, sealed and delivered in presence of
CHA. THOMPSON,
HENRY REMSES, Junr.,
BEN. BANKSON, Junr.

VII

VIRGINIA COMPACT.

AN ACT concerning the erection of the district of Kentuckey into an independent state.

Sect. 1. Whereas, it is represented to this present General Assembly, that the act of last session, entitled "an act concerning the erection of the district of Kentuckey into an Independent State," which contains terms materially different from those of the act of October session, one thousand seven hundred and eighty-five, are found incompatible with the real views of this Commonwealth, as well as injurious to the good people of the said district:

Be it enacted by the General Assembly, That in the month of May next, on the respective court days of the counties within the said district, and at the respective places of holding courts therein, representatives to continue in appointment for one year, and to compose a convention, with the powers, and for the purposes herein after mentioned, shall be elected by the free male inhabitants of each county above the age of twenty-one years, in like manner as delegates to the General Assembly have been elected within said district, in the proportions following: In the county of Jefferson shall be elected five representatives; in the county of Nelson five representatives; in the county of Mercer five representatives; in the county of Lincoln five representatives; in the county of Madison five representatives; in the county of Fayette five representatives; in the county of Woodford five representatives; in the county of Bourbon five representatives, and in the county of Mason five representatives: Provided, that no free male inhabitant above the age of twenty-one years, shall vote in any other county except that in which he resides, and that no person shall be capable of being elected unless he has been a resident within the said district at least one year.

Sect. 2. That full opportunity may be given to the good people of exercising their right of suffrage on an occasion so interesting to them, each of the officers holding such elections, shall continue the same from day to day, passing over Sunday, for five days, including the first day, and shall cause this act to be read on each day immediately preceding the opening of the election, at the door of the court-house or other convenient place; each of the said officers shall deliver to each person duly elected a representative, a certificate of his election, and shall transmit a general return to the clerk of the supreme court, to be by him laid before the convention.

Sect. 3. For every neglect of any of the duties hereby enjoined on such officer, he shall forfeit one hundred pounds, to be recovered by action of debt by any person suing for the same.

Sect. 4. The said convention shall be held at Danville on the twenty-sixth day of July next, and shall and may proceed, after choosing a president and other proper officers, and settling the proper rules of proceeding, to consider and determine whether it be expedient for, and the will of the good people of the said district that the same be erected into an independent state, on the terms and conditions following:

Sect. 5. First, that the boundary between the proposed state and Virginia, shall remain the same as at present separates the district from the residue of this commonwealth.

Sect. 6. Second, that the proposed state shall take upon itself a just proportion of the debt of the United States and the payment of all the certificates granted on account of the several expeditions carried on from the Kentuckey district against the Indians, since the first day of January, one thousand seven hundred and eighty-five.

Sect. 7. Third, that all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state.

Sect. 8. Fourth, that the lands within the proposed state of non-resident proprietors, shall not in any case be taxed higher than the lands of residents, at any time prior to the admission of the proposed state to a vote by its delegates in congress, where such non-residents reside out of the United States; nor at any time either before or after such admission, where such non-residents reside within this commonwealth, within which this stipulation shall be reciprocal; or where such non-residents reside within any other of the United States, which shall declare the same to be reciprocal within its limits; nor shall a neglect of cultivation or improvement of any land within either the proposed state or this commonwealth belonging to non-residents, citizens of the other, subject such non-residents to forfeiture or other penalty within the term of six years, after the admission of the said state into the Foederal Union.

Sect. 9. Fifth, that no grant of land or land warrant to be issued by the proposed state, shall interfere with any warrant heretofore issued from the land office of Virginia, which shall be located on land within the said district now liable thereto, on or before the first day of September one thousand seven hundred and ninety-one.

Sect. 10. Sixth, that the unlocated lands within the said district, which stand appropriated to individuals or description of individuals, by the laws of this comonwealth, for military or other services, shall be exempt from the disposition of the proposed state, and shall remain subject to be disposed of by the commonwealth of Virginia, according to such appropriation, until the first day of May, one thousand seven hundred and ninety-two, and no longer: thereafter the residue of all lands remaining within the limits of the said district, shall be subject to the disposition of the proposed state.

Sect. 11. Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

Sect. 12. Eighth, that in case any complaint or dispute shall at any time arise between the commonwealth of Virginia and the said district, after it shall be an independent state, concerning the meaning or execution of the foregoing articles, the same shall be determined by six commissioners, of whom two shall be chosen by each of the parties, and the remainder by the commissioners so first appointed.

Sect. 13. Provided, however, That five members assembled, shall be a sufficient number to adjourn from day to day, and to issue writs for supplying vacancies which may happen from deaths, resignations or refusals to act; a majority of the whole shall be a sufficient number to chuse a president, settle the proper rules of proceeding, authorize any number to summon a convention during a

recess, and to act in all other instances where a greater number is not expressly required. Two-thirds of the whole shall be a sufficient number to determine on the expediency of forming the said district into an independent state on the aforesaid terms and conditions, Provided, that a majority of the whole number to be elected concur therein.

Sect. 14. *And be it further enacted*, That if the said convention shall approve of the erection of the said district into an independent state on the foregoing terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, one thousand seven hundred and ninety-one, on which the authority of this commonwealth, and of its laws under the exceptions aforesaid, shall cease and determine forever over the proposed state, and the said articles become a solemn compact mutually binding on the parties, and unalterable by either without the consent of the other.

Sect. 15. Provided, however, That prior to the first day of November, one thousand seven hundred and ninety-one, the general government of the United States shall assent to the erection of the said district into an independent state, shall release this commonwealth from all its foederal obligations arising from the said district as being part thereof, and shall agree that the proposed state shall immediately after the day to be fixed as aforesaid posterior to the first day of November one thousand seven hundred and ninety-one, or at some convenient time future thereto, be admitted into the Foederal Union.

Sect. 16. And to the end that no period of anarchy may happen to the good people of the proposed state, it is to be understood that the said convention shall have authority to take the necessary provisional measures for the election and meeting of a convention, at some time prior to the day fixed for the determination of the authority of this commonwealth, and of its laws over said district, and posterior to the first day of November one thousand seven hundred and ninety-one aforesaid, with full power and authority to frame and establish a fundamental constitution of government for the proposed state, and to declare what laws shall be in force therein, until the same shall be abrogated or

altered by the legislative authority acting under the constitution so to be framed and established.

Sect. 17. *And be it further enacted*, That the electors in going to, continuing at, and returning from an election of members to the said convention, shall be entitled to the same privileges from arrest, as are by law allowed at an election of members to the General Assembly, and each person returned to serve as a member in said convention, shall be entitled to the same privileges from arrest in going to, during his attendance on, and returning from said convention, as are by law allowed to the members of the General Assembly.

Sect. 18. This act shall be transmitted by the executive to the representatives of this commonwealth in Congress, who are hereby instructed to use their endeavours to obtain from Congress a speedy act to the effect above specified.

(13 Va. St. at Large. Hening, p. 17.)

VIII

ACT OF CONGRESS.

CHAPTER IV.

AN ACT declaring the consent of Congress, that a new State be formed within the jurisdiction of the Commonwealth of Virginia, and admitted into this Union, by the name of the State of Kentucky.

Whereas, the Legislature of the Commonwealth of Virginia, by an act entitled "An act concerning the erection of the district of Kentucky into an independent state," passed the eighteenth day of December, one thousand seven hundred and eighty-nine, have consented, that the district of Kentucky, within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state: And whereas a convention of delegates, chosen by the people of the said district of Kentucky, have petitioned congress to consent, that, on the first day of June, one

thousand seven hundred and ninety-two, the said district should be formed into a new state, and received into the Union, by the name of "The State of Kentucky":

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled, and it is hereby enacted and declared,* That the congress doth consent, that the said district of Kentucky, within the jurisdiction of the commonwealth of Virginia, and according to its actual boundaries, on the eighteenth day of December, one thousand seven hundred and eighty-nine, shall, upon the first day of June, one thousand seven hundred and ninety-two, be formed into a new state, separate from and independent of, the said commonwealth of Virginia.

Sec. 2. *And be it further enacted and declared,* That upon the aforesaid first day of June, one thousand seven hundred and ninety-two, the said new state, by the name and style of the State of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.

Approved, February 4, 1781.

1 U. S. St. at Large 189.

IX

KENTUCKY STATUTES.

AN ACT declaring the boundaries of certain counties, in this Commonwealth.

[APPROVED 27TH JANUARY, 1810.]

Whereas doubts are suggested whether the counties calling for the river Ohio as the boundary line extend to the state line in the northwest side of said river, or whether the margin of the southeast side is the limit of the counties; to explain which

Be it enacted by the General Assembly, That each county of this commonwealth, calling for the river Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of

said river, and the bed of the river and the islands therefore shall be within the respective counties holding the mainland opposite thereto, within this state, and the several county tribunals shall hold jurisdiction accordingly.

This act shall be in force from and after its passage.

Kentucky Sess. Laws, 1810, p. 100.

X

AN ACT to ratify and confirm the adjustment of the boundary line between this state and the state of Tennessee, according to the articles of stipulation entered into by the commissioners appointed by both states.

[APPROVED FEBRUARY 11, 1820.]

Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the boundary line between the state of Tennessee and this commonwealth, as described in said agreement, subject to be run and marked as therein provided, shall be, and the same is hereby, ratified and confirmed.

Be it further enacted, That each and every article and stipulation of said agreement, either relating to the boundary line between the said states, or to the land claims of individuals, or to vacant and unappropriated lands, or to any other subject-matter in said agreement contained, shall be, and the same are hereby, ratified and confirmed, and shall be regarded in all courts of justice in this commonwealth as the law of the land.

The boundary of the State of Kentucky is declared to be as follows: Beginning at seven pines and two black oaks on the top of Cumberland mountain, on the Tennessee line, where it crosses said mountain, one mile and a half and twelve poles southwardly of the Cumberland gap; thence with Walker's old marked line south 86° west, by the magnetic meridian, crossing the left hand fork of Yellow creek at one mile, crossing Mingo mountain, and then crossing Bennett's fork of Yellow creek at five miles; then Log mountain, crossing Bowman's fork of the Clear fork of Cumberland at nine miles; the Trace fork at twelve

miles; Buffalo at fifteen; the Laurel fork at eighteen miles; Tom's creek at nineteen miles; and Primroy at twenty-one miles; then crossing Pine mountain, and the Clear fork of Cumberland river, in the lot at twenty-five miles; then crossing the Hackle knob to the Elk fork at twenty-eight miles; Indian creek at twenty-nine miles; then Gillico mountain and Gillico creek at thirty-three miles; and the right-hand fork of Gillico at thirty-six miles; Rock creek at forty-one miles; Marsh creek at forty-seven miles; the Roaring Ponch at forty-nine miles; Bear creek at fifty-four miles; the Big South fork of Cumberland at fifty-eight miles; Rock creek at sixty-eight miles; the left-hand fork of the Little South fork at seventy-six miles; passing the Chimney or Pilot Rock at seventy-eight miles; crossing the Poplar mountain into Stockton's valley at eighty-seven miles; and Pike's turnpike road at ninety miles; then crossing Wolf river six times; then Sulphur Lick creek at one hundred and four miles; Kettle creek at one hundred and twelve miles; in all, one hundred and fourteen miles to three hackberry trees on the bank of the Cumberland river, opposite the point where Walker's old line strikes the west bank of Cumberland river, and about twenty-four poles above the house occupied by John Kerr in 1821; thence west with Walker's old line to the Tennessee river; thence with and up said river to the point where the line run by Alexander and Munsell, in 1819, strikes said river; the river being the common boundary between the two states, and subject to their common use and concurrent jurisdiction; and thence with the line run by Alexander and Munsell, on the parallel of latitude 36° 30″, to the middle of the channel of the Mississippi river, opposite the point on the Mississippi below New Madrid, fixed, marked, and ascertained by them as the point of intersection of said parallel of latitude and said river; thence up said river to the mouth of the Ohio river, including within the boundary of Kentucky the islands in said Mississippi river known by the numbers One, Two, Three, Five (or Wolf Island), and Eight; thence crossing the Ohio river to the northwest bank, at low-water mark; thence up the northwestern bank of said river, at low-water

mark, to a point opposite the mouth of the Big Sandy river; thence across the Ohio river, and up the said Sandy river, to the mouth of the main western branch of Sandy; thence up the northeastwardly branch to a point on said branch from which a line drawn south 45° west will strike the road over the Cumberland mountains at the Little Paint gap, by some called the Hollow mountain, where it terminates at the west fork of Sandy, commonly called Russell's fork; and thence, continuing on the top or highest point of said mountain, keeping between the head waters of the Kentucky and Cumberland rivers on the right, and the head waters of Powell's and Guest's rivers on the left, to the beginning, on the said Cumberland mountain.

The sovereign power and jurisdiction of the commonwealth of Kentucky extends to and over the entire soil and waters within the limits described in the preceding section, except so far as she may have ceded jurisdiction to the United States for national purposes.

Each county in this commonwealth, whose boundary is described in part by the Mississippi and Ohio rivers, shall be considered as bounded in that particular by the state line; and the islands thereof shall be within the respective counties holding the mainland opposite thereto, within this state; and the several counties and tribunals thereof shall hold and exercise jurisdiction accordingly.

[Kentucky Statutes 1899, §198.]

XI

SECTIONS TAKEN FROM THE KENTUCKY STATUTES, 1899.

§1143. HIGHWAY OR WATER-COURSE BETWEEN COUNTIES. In all cases where any part of a river, water, water-course, highway, road or street, shall be the boundary line between two counties, the courts and judges and justices, and all circuit and county officers of both such counties, shall have concurrent jurisdiction in all cases over the whole

extent of such parts of said river, water, water-course, highway, road or street.

§1144. COUNTIES ON OHIO AND OTHER RIVERS. The circuit court of each county bordering on the Mississippi, Ohio, Big Sandy or Tennessee rivers shall have concurrent jurisdiction of any treason or felony committed on any of said rivers.

§1146. CONCURRENT JURISDICTION IN CASE OF DOUBT. When it is a matter of doubt, in the opinion of the court, in which of two or more counties the offense was committed, the court of either in which the indictment is found shall have jurisdiction of the offense.

§1147. INJURY INFLICTED IN ONE COUNTY, DEATH IN ANOTHER. If a mortal wound or other violence or injury be inflicted, or poison be administered, in one county or corporation, and death ensues in another, the offense may be prosecuted in either.

§2831. CONDEMNATION OF PROPERTY FOR MUNICIPAL PURPOSES. Whenever property shall be needed for appropriate municipal purposes, either within the boundaries of the city or the county, the board of public works may, with the consent of the mayor, if the amount be under two thousand dollars, order the condemnation of such property; and if the amount be over two thousand dollars may, with the consent of the mayor and the general council, order the condemnation of such property.

§2852. CONDEMNATION OF PROPERTY. Whenever, in the opinion of the board, property shall be needed for any of the purposes herein contemplated, either within or beyond the boundaries of the city, and within the county in which such city is situated, the board may, by resolution reciting such need, order the condemnation of such property, and proceeding for such condemnation shall be had in accordance with the provisions of sections ——, ——, of the act for the government of cities of the first class. (See sec. 2831.)

If any member of the board be the owner of or interested in any property necessary, in the opinion of a majority of the other members of the board, to be taken for park purposes, then proceeding to acquire such property shall

be by condemnation, and such facts of ownership or interest of such members, and the opinion of a majority of his colleagues and to the necessity for condemnation, shall be fully set forth in the petition.

§3039. BOUNDARIES — JURISDICTION. The corporate boundaries of each of said cities shall continue and remain as they are now established, until altered by law; and every such city, bounded in part by the Ohio river, shall have concurrent jurisdiction with the state of Kentucky over the waters of that river opposite thereto; and if the boundary line between any two or more of said cities, or of any such city and a county or counties not embraced in said city, shall be the Licking river, or other stream within the state, each city shall have concurrent jurisdiction with the other, and with such county or counties, over the waters of such river or stream opposite thereto.

§3290, Clause 3. CONTAGIOUS DISEASES—QUARANTINE. To prevent the introduction of contagious diseases into the city, to make quarantine laws for the purpose, and enforce the same within ten miles of the city.

§3290, Clause 4. HOSPITALS, ALMSHOUSES, PRISONS, WORKHOUSES. To establish and erect hospitals, almshouses, city prisons, workhouses, to make regulations for the government thereof, and to acquire and hold land for the purpose, either within or beyond the boundaries of the city.

§3290, Clause 5. WATER, LIGHT, POWER, HEAT AND TELEPHONE SERVICE. To provide the city and the inhabitants thereof with water, light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the prices to private consumers and customers.

§3290, Clause 9. LIQUORS—LICENSE—REGULATION OF SALE. To license, tax and regulate the sale of spirituous, vinous and malt liquors in the city or within one mile thereof.

§3490, Clause 6. HEALTH—QUARANTINE LAWS—HOSPITALS AND PESTHOUSES. To make regulations to prevent the introduction or spreading of contagious or infectious diseases in the city; to pass quarantine laws for that pur-

pose, and to enforce the same within one mile of the city; to establish and regulate hospitals or pesthouses in or outside of the city; to make all regulations necessary to secure the general health of the inhabitants of the city, and to regulate and provide for the burial of the dead.

§3490, Clause 8. TO PROVIDE CITY WITH WATER. To provide the city with water, or erect, purchase, or lease water-works and maintain same, or to make all necessary contracts with any person or corporation for such purposes; to erect hydrants, cisterns, fire plugs and pumps in the streets within or beyond the limits of the city.

§3490, Clause 27. LIQUORS—LICENSE, REGULATION OR RESTRAINT OF SALE—FEE. The council shall have power, by ordinance, to license, permit, regulate or restrain the sale of all kinds of vinous, spirituous or malt liquors within the limits of the city, or to restrain or prohibit the sale thereof within one mile of the limits thereof, provided nothing herein shall be construed as granting the power or right to one town or city to license, permit, regulate, restrain or prohibit the sale of vinous, spirituous or malt liquors in any other town or city, and may fix the penalty or fine for violation of an ordinance under this section at any sum not exceeding one hundred dollars: Provided, That no license to sell such liquors, to be drunk on the premises where sold, granted under this section, shall be for a less amount than two hundred and fifty dollars nor for a greater amount than one thousand dollars. For license to sell same by retail, for medical purposes, they may charge not less than fifty dollars, nor more than five hundred dollars. For license to sell same by retail in quantities not less than a quart they may charge not less than one hundred dollars nor more than five hundred dollars. The board of council shall, at any time, have the power and authority to refuse to grant any license, and to suspend or revoke any license granted under or by virtue of the authority conferred by this section, when the board shall deem it necessary so to do in order to preserve the peace or good morals of said towns, and said board of council shall be the exclusive judges of the necessity.

XII

OHIO CODE OF 1853.

Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. For the recovery of a fine, forfeiture or penalty imposed by a statute, except that, when it is imposed for an offense committed on a river, or other water-course, or a road, which is the boundary of the state, or of two or more counties, the action may be brought in any county bordering on such river, water-course, or road, and opposite to the place where the offense was committed.

[R. S. Ohio, 1898, §5025.]

XIII

ILLINOIS CONSTITUTIONS, 1848 AND 1870.

ARTICLE I. BOUNDARIES. §1. The boundaries and jurisdiction of the state shall be as follows, to wit: Beginning at the mouth of the Wabash river; thence up the same and with the line of Indiana to the northwest corner of said state; thence east, with the line of the same state, to the middle of Lake Michigan; thence north, along the middle of said lake, to north latitude 42 degrees and 30 minutes; thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river; and thence up the latter river, along its northwestern shore, to the place of beginning: Provided, That this state shall exercise such jurisdiction upon the Ohio river as she is now entitled to, or such as may be agreed upon by this state and the state of Kentucky.

XIV

ILLINOIS STATUTES.

AN ACT concerning the jurisdicton of the State of Illinois over the Ohio river.

[Approved, February 9, 1849.]

Section 1. *Be it enacted by the people of the state of Illinois, represented in the general assembly*, That hereafter the jurisdiction of the state of Illinois shall be considered as extending, and as being concurrent with the state of Kentucky, over the Ohio river.

§2. Each of the several counties of this state, lying on the Ohio river and bounded thereby, are hereby invested with concurrent jurisdiction over the said river, in all cases occurring on said river and opposite to each of the said counties.

§3. Nothing herein contained shall be so construed as to extend the jurisdiction of said state over any islands in said river included within the corporate limits of any county in the said state of Kentucky.

[Acts Illinois, 1849, p. 134.]

XV

INDIANA STATUTES.

INDIANA TERRITORY. A LAW AUTHORIZING THE APPOINTMENT OF A PILOT.

Adopted from the Kentucky code, and published at Vincennes, the twenty-fourth day of September one thousand eight hundred and three, by William Henry Harrison, governor, and Thomas T. Davis, and Henry Vander Burgh, judges in and over said Territory.

Whereas, great inconveniences have been experienced, and many boats have been lost in attempting to pass the rapids of the Ohio for want of a pilot, and from persons offering their services to strangers to act as pilots by no means qualified for the business for remedy whereof the

governor of this territory is hereby authorized and directed to appoint such person or persons for pilots as to him shall seem best qualified for that purpose, taking bond and security of the person so appointed payable to the governor and his successors in the sum of eight hundred dollars for the due and faithful performance of his office; and the pilot so appointed shall receive for each boat he pilots through the rapids two dollars. And any other person acting as pilot without being duly authorized as by this law directed, shall for every such offense forfeit and pay ten dollars to the use of the territory to be recovered before any justice of the peace of the county of Clark, at the suit of the pilot, whose duty it is hereby made to prosecute for the same, and collected by the sheriff or constable of the said county in the same manner that other fines are by law directed to be collected; and the sheriff or constable shall pay the money so collected to the treasurer of the territory taking his receipt for the same and the sheriff or constable shall have the same fees for their services as they are entitled to by law for collecting fines and forfeitures in other cases, but nothing herein contained is meant to compel any owner or skipper of a boat to employ said pilot or pilots, but they shall be at liberty to pilot their own boats through the said rapids.

The foregoing is hereby declared to be a law of the territory, to take effect accordingly. In testimony whereof, we, William Henry Harrison, Thomas T. Davis, and Henry Vander Burgh, have caused the seal of the territory to be thereunto affixed and signed the same with our names.

WILLIAM HENRY HARRISON,
THOMAS TERRY DAVIS,
HENRY VANDER BURGH.

[Territorial Laws Indiana, 1801-6, reprint, p. 55.]

[Re-enacted by territorial legislature of Indiana, September 17, 1807; R. S. Ind. Terr. 1807, c. 70, p. 364.]

XVI

AN ACT to prohibit the giving or selling intoxicating liquors to Indians.

Whereas many abuses dangerous to the lives, peace and property of the good citizens of this territory, and derogatory to the dignity of the United States, have arisen by reason of traders and other persons furnishing spirituous and other intoxicating liquors to the Indians inhabiting or coming into this territory, for remedy whereof,

§1. *Be it enacted by the Legislative Council and House of Representatives, and it is hereby enacted by the authority of the same*, That if any trader or other person whomsoever residing in, coming into, or passing through the said territory or any part thereof, shall presume to furnish, vend, sell or give, or shall direct or procure to be furnished, vended, sold or given upon any account whatever to any Indian or Indians, or nation or tribe of Indians being within the territory, or waters adjoining to, or bounding the same, any rum, brandy, whiskey or other intoxicating liquor or drink, he, she or they so offending shall on conviction by presentment or indictment, forfeit and pay for every such offense any sum not exceeding one hundred dollars nor less than five dollars to the use of the territory: Provided, that nothing herein contained shall be taken or construed to impair or weaken the powers and authority that now are, or any time hereafter may be vested in the governor or other person as superintendent or agent of Indian affairs, or commissioner plenipotentiary for treating with Indians. This act shall commence and be in force, when, and as soon as the governor of this territory shall be officially notified that the states of Kentucky and Ohio, and the territories of Louisiana and Michigan have passed, or shall pass laws for prohibiting the sale or gift of intoxicating liquors to Indians within their respective states and territories; and it shall continue in force so long as the said acts made or to be made in the said states and territories shall continue in force therein. The governor of the territory is requested to transmit copies of this law to the

governors of the several above mentioned states and territories.

JESSE B. THOMAS,
Speaker of the House of Representatives.

P. MENARD,
President pro tempore of the Council.

Approved August 15, 1805.

WILLIAM HENRY HARRISON.

[Territorial Laws Indiana, 1805, p. 6.]
[Re-enacted September 17, 1807; R. S. 1807, c. 53, p. 387.]

XVII

AN ACT to incorporate the Indiana Canal Company.

Whereas, it has been represented to this General Assembly that Benjamin Hovey and Josiah Stephens, and sundry other persons have associated for the purpose of making a canal at the falls of the Ohio, on the northwest side thereof, and with a view to further this laudable design, have actually subscribed considerable sums of money thereto, upon condition that the legislature shall deem it expedient to grant them support and encouragement by giving them, and such others as shall hereafter subscribe and join their association, a suitable charter of incorporation, as doth appear by their memorial to the legislature; And, whereas, it is highly interesting to the commerce and agriculture of this territory, that the object of the said association should be carried into effect, and the legislature being disposed to give every suitable aid thereto,

Be it therefore enacted by the Legislative Council and House of Representatives of the Indiana Territory, That the said Benjamin Hovey and Josiah Stephens and their present and future associates; their successors, and assigns, be, and they are hereby created a body corporate and politic,

by the name of the "President and directors of the Indiana Canal Company," and are hereby ordained, constituted and declared to be forever hereafter a body politic and corporate, in fact and in name, and by that name they and their successors shall and may have continual succession, and shall be persons in law capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended in all courts and places whatsoever, in all manner of actions, suits, complaints, matters and causes whatsoever, and that they and their successors may have a common seal, and make and alter the same at their pleasure, & also that their successors by the same name & style shall be in law capable of purchasing, holding & conveying any estate real & personal for the use of said corporation.

§2. And be it further enacted, That the capital stock of said company shall consist of twenty thousand shares of fifty dollars each, and that subscriptions to the capital stock of said company may be received by such person and persons, and under such regulations as the directors for the time being or a majority of them shall prescribe and ordain.

§3. And be it further enacted, That the stock, property and concerns of the said company shall, until the first Monday in May next, be conducted by twelve directors hereafter named, and after that day the same shall be conducted and managed by seven directors, being stockholders, who shall hold their offices for one year from the said first Monday in May next, and the said directors shall be elected by ballot annually, on the first Monday in May, at such hour of the day and at such place within the said territory, as the said president and directors for the time being shall appoint and public notice shall be given by the said directors, not less than 30 days previous to the time of holding said election by an advertisement to be inserted in some one or more newspapers printed in the territory, and in the state of Kentucky, and the said election shall be made by such of the stockholders as shall attend for that purpose, or by proxy, each share having one vote for every share as far as ten shares, and one vote for every five shares above

ten; and the directors so to be chosen shall at their first meeting elect by ballot, one of their members to be their president.

§4. And be it further enacted, That George Rogers Clark, John Brown, Jonathan Dayton, Aaron Burr, Benjamin Hovey, Davis Floyd, Josiah Stephens, William Croghan, John Gwathmey, John Harrison, Marston G. Clark, and Samuel C. Vance, shall be first directors, and shall hold their offices until the first Monday in May next, and that at their first meeting they shall by ballot, elect one of their members to be their president, and that the said president and directors, and the president and directors hereafter to be chosen, a majority of whom being assembled shall constitute a board, shall have power to appoint the time and place of all meetings for the dispatch of business, to appoint such superintendents, engineers, clerks and other officers, agents and servants and exact from them such security for the performance of the duties assigned them, as they, the said directors shall judge requisite and proper and necessary, for carrying into effect the purposes of this act, and to agree for, and settle their respective wages, and all allowances, and to pass and sign their accounts, and also to make and establish rules of proceedings, and to make such bye-laws, rules and regulations not inconsistant with the constitution and laws of the United States, nor the laws of this territory, as may appear to them most conducive to the ends proposed by this act, and to conduct all other business and concerns of the said company.

§5. And be it further enacted, That in case of the death, resignation or refusal to act of any director or directors chosen as aforesaid, it shall and may be lawful for the remaining directors, upon public notice being given at least fifteen days for that purpose, to proceed to elect a director or directors, to fill such vacancy or vacancies.

§6. And be it further enacted, That in case of the death, resignation or refusal to act of the president, it shall and may be lawful for said directors to chose a president pro tem. and for the meeting only, for which he shall be chosen.

§7. And be it further enacted, That it shall and may be lawful for the said company, by its president and directors, or by any superintendant, agent or engineer, appointed under the seal of the said company, to enter into and upon, and to take possession of any land, whether covered with water or not, which the said company may deem necessary for the prosecution of the works and improvements contemplated by this act, or whereon, or whereby to construct any canal, locke, dyke, embankment, pond, dam or other work intended or permitted by this act, and that without the lease and permission of the owner or owners, proprietor or proprietors, of such land first had and obtained, but the land so to be taken and appropriated shall be valued and paid for in the manner hereinafter provided. Provided always, and it is hereby fully understood, That for the purposes aforesaid it shall not be lawful for the said company to condemn a greater quantity of land than one hundred acres.

§8. And be it further enacted, That it shall be lawful for the said company hereby incorporated, and for all and every other person or persons, employed by or under them for the purposes contemplated by this act, from time to time, to enter upon any lands contiguous or near to the intended canal or other works, or the places which may be selected for, or intended to be used or employed for the same, with carts, waggons and other carriages, and beasts of draught and burthen, and all necessary tools and implements, both for executing and making, and for altering and repairing the said works, or any of them, and to take and carry away any timber, stone, clay, gravel, sand or earth, from the same, for the making, altering or repairing of the said works, or any of them, subject always to the making of compensation for all damages thereby occasioned, either by agreement of parties, or in the mode hereafter prescribed: Provided, That the said company shall not take, or carry away, any timber, stone, clay, gravel, sand or earth, after the said canal and other works, hereby contemplated are completed, until they shall pay the damages assessed as aforesaid.

§9. And be it further enacted, That the said president and directors for the time being, may agree with the owners of any lands so taken or appropriated, or injured as aforesaid, for the purchase of the said lands, or for compensation for the said injury and damages, as the case may be, but in case of disagreement, or in case of the owner or owners of such lands shall be feme covert, under age, non compos mentis, or out of the territory, then it shall be lawful for the judges of this territory, or the judges of the supreme court when this territory shall become a state, or any one of them not being interested in the said company, or in the said lands, upon the application of either party to nominate and appoint seven indifferent persons, to view and survey the said lands, and to estimate the injury sustained as aforesaid, or the value of the said lands, as the case may require, and to report thereupon, to the said court without delay, and upon the coming in of such report, and the confirmation thereof by the said court, the said president, directors and company shall pay to the said owners, respectively, the sum mentioned in such report, in full compensation for the said lands, or for the injury done as aforesaid, as the case may be, and upon such payment, the said president, directors and company, shall be, and become seized in fee, of all such lands, hereditaments and tenements, as they shall have taken possession of, appropriated, and paid for as aforesaid, and they, and all those who have acted under them, shall be acquitted and exonerated, of and from all claim and demand on account of such injury or damage.

§10. And be it further enacted, That whenever the said canal shall cross any public or private laid out road or highway, or shall divide the grounds of any person into two parts, so as to require a bridge to cross the same, the referee who shall enquire of the damages to be sustained in manner herein directed, shall find and ascertain whether a passage across the same shall be admitted and maintained by a bridge, and on such finding, the said directors shall cause a bridge fit for the passage of carts and waggons to be built, and forever hereafter maintained and kept in repair, at all and every the places so ascertained by the said referees, at

the costs and charges of the said company; but nothing herein contained shall prevent any person from erecting and keeping in repair any foot, or other bridge across the said canal, at his or her own expense, when the same shall pass through his or her ground: Provided, the same shall be of such height above the water as shall be usual in the bridges erected by the company. And Provided Also, that such foot or other bridges to be erected by the owner or owners of such land, shall not interfere with any of the locks, buildings, passage of vessels, boats, rafts or other works of the company.

§11. And be it further enacted, That the said president and directors and their successors, a majority of them being assembled, shall have full power and authority to agree with any persons on behalf of the said company to cut such canal from such place above, to such place below the falls, on the north west side of the river Ohio, & to erect such locks, and to perform such other works as they shall judge necessary, for opening, improving and extending the navigation of said river, and for the other purposes authorised by this law, and for repairing and keeping in order the said canal, locks & other works.

§12. And be it further enacted, That it shall be lawful for the said company to receive from the United States, or from any state, or from any body corporate or politic, donations of lands, money or other chattels for the use of the said company, and to receive for the same use and purpose, voluntary subscriptions and donations from any individuals who may be disposed to encourage and promote the objects of this act, and it shall and may be lawful for the said company, in case of refusal or neglect of payment, in the name of the company aforesaid, to sue for, and recover of all such subscribers, their heirs, executors or administrators, the sums by them respectively subscribed, by action of debt, or upon the case, in any court of record having competent jurisdiction.

§13. And be it further enacted, That if at any time, it shall, in the opinion of the said company, become necessary in order to effect the purposes authorised by this act, to increase the said capital stock, and number of shares, it shall

and may be lawful for the said company, in their discretion from time to time to increase the said capital, by the additions of so many whole shares, as shall be judged necessary by the said proprietors, or a majority of them in interest, and that subscriptions for the said shares shall be received at such time and place, and in such manner, as the directors for the time being, shall think proper to order and prescribe.

§14. And be it further enacted, That it shall be lawful for the said directors to call for, and demand from the stockholders, respectively, all such sums of money by them subscribed, or to be subscribed, at such times, and in such proportions, as they shall see fit, under pain of forfeiture of their shares, and all previous payments thereon to the said president, directors, and company.

§15. And be it further enacted, That in consideration of the expenses the said proprietors shall be at in opening and completing the said canal, and in keeping the works in repair, and in effecting the objects authorised by this act, the said works and canal, and other property which the said company shall acquire, with all profits and appurtenances, shall be, and the same are hereby vested in the said company, and their successors forever, and the canal, and the water works erected thereon, or adjoining thereto, shall be exempt from the payment of any tax, imposition or assessment whatsoever, until the said works shall be in operation, and that the shares in the stock of the said company, shall be deemed, and are hereby declared to be personal, and not real estate, and that the same may be transferred and assigned, so as to convey the absolute property thereof, in such manner and form as by the said president and directors, shall by, bye-laws to be made for that purpose ordain and prescribe.

§16. And be it further enacted, That it shall and may be lawful for the said president and directors at all times, forever, to demand and receive at such time and place, or places on the said canal, as they shall adjudge and determine to be most convenient for all boats, vessels and rafts conveyed through the said canal, or any part thereof, according to the following table and rates to wit: For each

boat not more than 14 feet wide and 30 feet long, three dollars: For each boat not more than 14 feet wide, and 45 feet long, four dollars: For each boat not more than 14 feet wide, and 60 feet long, five dollars: And every foot over and above 14 feet wide and 60 feet long, nine cents: For each keel boat, perogue or canoe, not more than 35 feet long, two dollars; For each keel boat, perogue or canoe, not more than 45 feet long, three dollars; For each keel boat, perogue or canoe, not more than 60 feet long, four dollars: And for every foot over and above sixty feet long, nine cents; And for all rafts or lumber, not laden on board a boat or vessel such sum as shall be agreed by and between the owner or supercargo and the said company or their agent.

§17. And be it further enacted, That the collector of the toll duly appointed and authorised by the president and directors of the said corporation, may stop and detain all boats and vessels using the canal until the owner or commander or supercargo of the same shall pay the toll so as aforesaid fixed, or may distrain part of the cargo therein contained, sufficient by the appraisement of two indifferent persons to satisfy the same, which distress shall be kept by the collector of tolls taking the same, for the space of eight days, and afterwards be sold by public vendue, in any public place in the neighborhood, to the highest bidder, in the same manner and form, as goods distrained for rent, are by law sold, rendering the surplus, on demand, if any there be, after the payment of the said toll, and costs of distress and sale to the owner, or owners thereof.

§18. And be it further enacted, That the said company may vest any part of their capital, or of the profits thereof, as to the directors for the time being shall deem expedient, in the public debt of the United States, or of any particular state, or in the stock of any incorporate monied institution, or may employ the same in commercial operations, or in any other monied transactions, not inconsistent with the constitution and laws of the United States, or laws of this territory, and for the sole benefit of the said company.

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§19. And be it further enacted, That as soon as one hundred thousand dollars in gold or silver shall have been actually received, or the value thereof in lands actually acquired in fee simple, on account of the subscription for the said stock, it shall and may be lawful for the said company to issue promissary notes, payable to any person or persons, his, her or their order, or to bearer, which being signed by the president, and countersigned by the treasurer or clerk, although not under the seal of the corporation, or having been issued pursuant to any resolution, or bye-law of the said company, though not so signed, shall be binding and obligatory on the same, and shall be negotiable & assignable by endorsement, or if payable to bearer, by delivery; Provided, That the said company shall make a fair statement of all the lands which they possess, to the legislature, yearly, if thereto required, who will estimate the value of the same.

§20. And be it further enacted, That the total amount of the notes issued in manner and form aforesaid, shall not at any time exceed double the amount of cash in fund, and the value of the lands belonging to said company, in case of excess, the president and directors under whose administration it may happen, shall be liable for the same in their natural and private capacities, and an action of debt, or on the case, may be brought against them, or any of them, or any of their heirs, executors or administrators, in any court of record in the United States, having competent jurisdiction, by any creditor or creditors of the said company, and may be prosecuted to judgment and execution; But this shall not be construed to extend, to exempt the said company, or the lands, tenements, hereditaments, goods or chattels of the same, from being also chargeable with the said excess.

§21. And be it further enacted, That the books of the said company shall always be open for the inspection of the legislature of this territory, or any person or persons to be appointed by them for that purpose.

§22. And be it further enacted, That in case the said company shall not begin the said canal within nine months from the passing of this act, or shall not, on or before the first day of December, which will be in the year eighteen hundred and eleven, so far complete the said canal, as to admit of the passage of boats drawing not more than three feeet water, then, and in either of those cases, or on such defrult being ascertained, all the preference, privileges and powers, given and granted by this act, shall thenceforth cease, determine, and be absolutely void.

§23. Provided always nevertheless, and it is hereby enacted and declared, That it shall and may be lawful for any future legislature of this territory, or any state to be formed therein, at any time or times hereafter, after the expiration of fifteen years from the passage hereof, to alter, abridge, limit, extend, annul or destroy all, or any of the powers, privileges and immunities hereby given, so as the said canal, and the tolls thereof, and the buildings and works erected thereon, or on the waters taken therefrom, shall remain to the said company, their heirs and successors.

§24. And be it further enacted, That the directors herein appointed to act as such, until the first day of May next shall be entitled to have and receive three dollars per day, for every day they shall attend or expend from their several places of abode, in, and about the execution of the trust hereby reposed in them, which shall be paid to such director or directors, from the funds of the company. Provided always, and it is further enacted and declared, That it shall and may be lawful for this territory, or any state to be formed therein, in that part thereof in which the said canal is situate, at any time or times hereafter, to subscribe for such, and so many shares of the said capital stock, as may be then unsubscribed for, and in case the same shall be so subscribed, then for so many shares of additional stock, as they may think proper, not exceeding in the whole, one thousand shares.

§25. And be it further enacted, That it shall be incumbent on the said president and directors, to keep open their books of subscription for the space of four months from the

passage hereof, at the town of Jeffersonville, in the Indiana territory. This act shall commence and be in force from and after the passage thereof.

JESSE B. THOMAS,
Speaker of the House of Representatives.

B. CHAMBERS,
President of the Council.

Approved, August 24, 1805.

WILLIAM HENRY HARRISON.

[Territorial Laws, Indiana, 1805, p. 35.]

XVIII

AN ACT supplementary to an act to establish ferries, and an act supplementary thereto.

[APPROVED DECEMBER 20, 1815.]

§1. *Be it enacted by the Legislative Council and House of Representatives, and it is hereby enacted by the authority of the same*, That the county courts of the several counties within this territory are hereby authorized to establish ferries over the river Ohio, or any of the rivers or creeks bordering or adjoining this territory, within the jurisdiction of their respective counties, under the same rules, restrictions and regulations as are now provided by law, for the establishing of Ferries over any river or creek within this Territory.

§2. Be it further enacted, That all Ferries heretofore established by the courts of common pleas, former circuit courts, or present county courts of any of the counties in this Territory, or by the former or present governor of the Territory, over the river Ohio, or any of the rivers or creeks bordering or adjoining this Territory, shall be deemed lawfully established to all intents and purposes, provided that the owner or owners of any such ferry, shall within six months from and after the passage of this act, execute a bond (as is provided in the second section of the act enti-

tled "An act to establish and regulate ferries") in the county where any such ferry shall have been established: Provided, also, That the county courts as mentioned in the second section of this act, shall have power to vacate any such ferry where the owner or owners of any such ferry are not the proprietor or proprietors of the land or landing where any such ferry has been established.

§3. Be it further enacted, That whenever any person owning a ferry established by law, on any river or creek within or bordering on this Territory, shall sell, transfer and assign the same, his license shall cease and be void from the time of making such sale, transfer or assignment, provided that the court or authority granting ferries, shall grant to such purchaser or assignee, a license in his own name, by his entering into bond with sufficient security, to discharge the duties of ferry keeper; and on such license being granted, the former owner or assignor shall be barred from any damages arising from the misconduct or neglect of such purchaser or assignee.

§4. Be it further enacted, That it shall be the duty of the owner or superintendent of every ferry, when he shall be called upon to land any person of property from any boat passing down the river Ohio, to do the same at the same rate of ferriage he is authorized to charge for ferrying such person or property across the river aforesaid.

[Acts 1815, c. 17, p. 64.]

XIX

AN ACT to amend the several acts regulating Ferries.

[Approved December 27, 1816.]

§1. *Be it enacted by the General Assembly of the State of Indiana*, That the act, supplementary to an act to establish ferries, and an act supplementary thereto, approved December the twenty-sixth, one thousand eight hundred and fifteen, be and the same are hereby repealed.

§2. All ferries which may have been heretofore granted, or established by the former governor of the Indi-

ana territory; previous to the taking effect of a law of said territory, authorising the court of common pleas or circuit courts of said territory, prior to the first day of the last territorial legislature, over the Ohio river, or over any creek or water course within this state, be considered as established ferries, any law, usage or custom to the contrary notwithstanding; and that any person or persons, owning a ferry hereby established, shall within nine months, give bond and approved security to the commissioners of the county in which said ferry may lie, conditioned according to law: Provided, however, That in all cases where a transfer of any of the said ferries shall have taken place, the person or persons holding such ferry by purchase and transfer, shall be entitled to all the advantages which the person in whose name the ferry may have been first granted or established, upon the same conditions and regulations as are applicable to persons who have heretofore had any ferry established in his own name, any law, usage or custom to the contray notwithstanding.

[Acts Indiana, 1816, p. 158, c. 29.]

XX

AN ACT incorporating the Ohio Canal Company.

Sections 7 and 11 of Act approved January 3, 1817.

§7. It shall and may be lawful for the said company by its president and directors, or by any superintendant, agent or engineer appointed under the seal of the said company to enter into and upon, and to take possession of any land whether covered with water or not which shall or may be necessary for the prosecution of the works and improvements contemplated by this act, or whereon or whereby to construct any canal, lock, dyke, embankment, pond, dam or other work intended or permitted by this act, and that without the leave and permission of the owner or owners, proprietor or proprietors of such land first had and obtained, but the lands so to be taken and appropriated shall be valued and paid for in the manner hereinafter pro-

vided: Provided always, That it is hereby fully understood that for the purposes aforesaid it shall not be lawful for the said company to condemn a greater quantity of land than one hundred acres.

§11. The said president and directors and their successors, a majority of them being assembled shall have full power and authority to agree with any person on behalf of the said company to cut such canal from such place above to such place below to the falls on the northwest side of the river Ohio, and to erect such locks and to perform such other works, as they shall judge necessary for opening, improving and extending the navigation of said river and for the other purposes authorised by this law; and for repairing and keeping in order the said canals, locks, and other works.

[Acts 1817, p. 219.]

XXI

Preamble and Sections 1 and 5 of Act of January 28, 1818.

AN ACT to Incorporate the Jeffersonville Ohio Canal Company.

[APPROVED JANUARY 28, 1818.]

Whereas, it has been represented to this General Assembly, that the obstructions to navigation in the Ohio river at the Great Falls, opposite and in the neighborhood of the town of Jeffersonville, in the county of Clark and the state of Indiana, very much impede and embarrass the commercial transactions of the states of Pennsylvania, Virginia, Ohio, Kentucky and Indiana: AND FOR REMEDY WHEREOF,

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That a company shall be formed for the purpose of constructing a canal on the northwest side of the said Ohio river, the stockholders of which, and all others that hereafter may become stockholders in the manner hereinafter provided and prescribed, their successors and assigns shall be, and they are hereby created, constituted, ordained and declared to be forever hereafter, a body politic, subject to the regulations, limitations and re-

strictions hereinafter mentioned and directed; and corporate in fact and in name, and by the name and style of the President, Directors and Company of the Jeffersonville Ohio Canal Company, and by that name, they and their successors shall have continual succession, and shall be persons in law, capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, in all manner of suits, actions, plaints and causes, and that they and their successors may have a common seal, and make and alter the same at their pleasure; and they and their successors by the same name and style, shall be in law, capable of purchasing, holding and conveying any estate, real or personal, for the use of the said corporation.

Sec. 5. It shall and may be lawful for the said company, its president and directors, or any other person appointed under the seal of the said company, to enter upon and take possession of any land whether covered with water or not, which shall or may be necessary for the prosecution of the works and improvements contemplated by this act, or whereupon it may be necessary to open or construct any canal, lock, dyke, embankment, pond, dam or other work intended or permitted by this act, without the consent of the owner or proprietor of such land; but the lands so taken and appropriated, shall be valued and paid for in the manner hereinafter provided: Provided, That for the purposes aforesaid, it shall not be lawful for the said company to take and condemn a greater quantity of land than two hundred acres.

[Acts Indiana, 1818, p. 57, c. 27.]

XXII

AN ACT authorizing the appointment of a Pilot at the Falls of Ohio.

[APPROVED JANUARY 10, 1818.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That the governor is hereby authorised and directed to appoint such person or persons for

pilots, as to him shall seem qualified for that purpose, taking bond and security of the person so appointed, payable to the governor and his successors in office, in the sum of two thousand dollars for the due and faithful performance of his office; and the pilot so appointed, shall receive for each boat he pilots through the rapids, two dollars. Any other person acting as pilot without being duly authorised as by this law directed, shall for every such offense, forfeit and pay ten dollars, one half of which fine shall go to the use of such pilot and the other half thereof to the use of the county seminary in the county where such fine is assessed, to be recovered before any justice of the peace in this state, at the suit of the pilot, (whose duty it is hereby made to prosecute for the same,) and collected by the sheriff or constable of the proper county, in the same manner that other fines are directed to be collected; and the sheriff or constable shall pay the money so collected to the treasurer of the proper county, taking his receipt for the same and the sheriff or constable shall have the same fees for their services as they are entitled to by law for collecting fines and forfeitures in other cases. But nothing herein contained, is meant to compel any owner or shipper of a boat to employ said pilot or pilots, but they shall be at liberty to pilot their own boats through the said rapids: Provided, however, That nothing herein contained, shall be so construed as in any manner to affect the pilot or pilots heretofore appointed, except that they shall and are hereby required to give bond as enjoined in the foregoing part of this act: Provided also, That there shall not, at any one time, be more than three pilots in commission.

This act to be in force from and after its publication.

[Acts Indiana, 1818, p. 11, c. 4.]

XXIII

AN ACT for the relief of George White upon the subject of a ferry.

[NOT APPROVED.]

Whereas George White of Jeffersonville in the county of Clark and state of Indiana has for satisfactory reasons,

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set forth in his petition to this General Assembly, prayed that an act might be passed to confirm him in the right to a certain ferry, which he purchased of Samuel Merriwether and so to alter or extend said privilege, as to authorize him to ferry from any portion of the public ground in said town lying along and bordering on the Ohio river to the opposite shore or bank on the Kentucky side or to the mouth of Bear Grass creek; and as it appears reasonable and just that the prayer of the said White should be granted, and that the granting of the same will be of public advantage and utility; therefore,

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That the said George White be and he is hereby and hereafter authorized to keep a ferry in said town of Jeffersonville and to ferry off and from any portion of the public ground or commons in said town lying along or bordering upon the Ohio river across said river to the opposite shore or to the mouth of Bear Grass creek: Provided, the said White shall within six months, after the publication of this act, execute and give a bond, with one or more good and sufficient freeholders of said Clark county as security, in the sum of five hundred dollars payable to the commissioners of said Clark county, or their successors in office, conditioned that the said White shall keep or cause to be kept the ferry hereby established agreeably to law, which bond may be given or delivered to the board of commissioners when sitting, or in vacation filed with the clerk. And it is furthermore provided that nothing in this act shall be so construed as to authorize the said White to ferry from any portion of the public ground in said town which borders upon the Ohio river and lies immediately in front of any lot or lots owned at this time by any person or persons lawfully entitled to keep a ferry or ferries in said town.

Sec. 2. And be it further enacted, That the said White or any person or persons owning or keeping said ferry hereby established, shall be entitled to ask, demand and receive, such reasonable rate or rates of ferriage as now are or hereafter may be fixed by law and shall likewise be subject to such fines and penalties, rules and restrictions as

now or shall be prescribed by law, for the good government and regulation of ferries established over the Ohio river, in order to prevent any impositions or unnecessary delays: Provided, however, That the said George White shall not hold or enjoy any other or greater privileges than are now held and enjoyed by other persons in the town of Jeffersonville, who have ferries established according to law: And provided also, That the county commissioners of said county of Clark may vacate, set aside and make void the said ferry hereby established for or on account of the same not being kept up and attended to according to the provisions of the act entitled an act regulating ferries and an act supplemental thereto or for any of the causes which would authorize said commissioners to vacate any ferry established, in pursuance of the aforesaid recited acts.

Sec. 3. And so soon as this act shall have taken effect, and the bond required in the first section shall have been given in the manner provided for, the bond which was given by Samuel Merriwether to keep his ferry agreeably to law, shall be considered as void and the said Merriwether and his security shall no longer be liable or holden on account of said bond.

[Acts Indiana, 1820, p. 120.]

XXIV

AN ACT providing for opening a Canal at the Falls of the Ohio.

[APPROVED JANUARY 31, 1824.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That William Hendricks and Christopher Harrison, be, and they are hereby appointed commissioners, to take measures and provide the means under the authority of this act, and subject to the directions of the General Assembly as from time to time may be provided by statute, for commencing and completing a canal around the falls of the Ohio, at Jeffersonville.

Sec. 2. That said commissioners are hereby authorized to employ engineers, surveyors, agents, and others, make contracts, and do and perform all acts necessary and proper for the furtherance of the enterprize aforesaid.

Sec. 3. That said commissioners are hereby authorized, to borrow money in such sums and to such amount, as may be commensurate to the completion of the work aforesaid, on such terms of credit and rate of interest, not exceeding six per centum per annum, as they shall deem most advantageous to the state; and that they be authorized to pledge the stock in, and revenue arising from said canal, the amount of monies now in the treasury belonging to the three per cent. fund, and the three per cent. fund except the balance of one hundred thousand dollars appropriated by the act, entitled "An act authorizing the laying off of certain state roads in this state, and appropriating one hundred thousand dollars of the fund commonly called the three per cent. fund for opening the said roads," approved, December 31st, 1821, yet remaining undrawn to any extent which may be deemed advisable, expedient, or necessary for the payment of the interest and principal of such loans.

Sec. 4. That said commissioners be authorized to apply to the Congress of the United States for a loan to be granted to this state, upon the pledges aforesaid, and also to apply to the legislatures of those states, who are interested in the navigation of the Ohio river above the said falls, for aid in said undertaking at their discretion, and to make such pledges on the part of this state, consistent with the provisions of this act, as they may deem most advisable in order to secure their co-operation.

Sec. 5. That said commissioners are authorized to apply to the legislature of the state of Ohio, for co-operation in the purposes of this act, without delay, and to request that commissioners on the part of said state be appointed with full powers, to act with the commissioners on the part of this state, and in case such appointment be made, the commissioners of this state are hereby vested with full powers to make such arrangement with the commissioners on the part of the state of Ohio, as shall be just, liberal and requisite to effectuate the objects contemplated by this act; and if any co-operation as aforesaid shall not be effected, the said commissioners are authorized to take such other measures, in their discretion in relation to said canal, as may seem most advisable and expedient.

Sec. 6. That said commissioners apply if they find the same expedient, to the President and Directors of the Jeffersonville Ohio Canal Company, for a cession of any right of land of which they may be owners and which may lie in the course of said proposed canal, and also to the proprietors of land through which said canal may pass, for grants, upon such terms, as may be agreed upon, and if difficulty or opposition arise concerning any such lands, the circuit court of Clark county, shall direct on the application of said commissioners, the valuation of the land by the oaths of three disinterested freeholders, to be made with such ceremonies, as said court shall deem advisable, in order to do justice, and the commissioners shall on such valuation, take possession of such lands, and pay the owners, the value thereof, out of the funds procured under the provisions of this act, and the said lands, so soon as valued as above directed, shall be vested in the state for the use of said canal.

Sec. 7. That said commissioners shall with as little delay as possible, after the taking effect of this act, proceed in the execution of their said duties and upon procuring contracts for loans to an amount probably sufficient and equal to the completion of said canal, shall have the routes thereof surveyed, the expense of each estimated, and make selection of that route which appears best calculated for the interest of the state, and thereupon shall make such arrangements and contracts for the completion of said canal, as shall be deemed most expedient: Provided, That the commissioners appointed by this act, shall in no case, employ any surveyors or engineers, until they have obtained a loan, which in their opinion will be sufficient to complete the canal aforesaid.

Sec. 8. That said canal shall be excavated to the depth of at least four feet below low-water mark, and of a sufficient breadth to admit the passage of steamboats.

Sec. 9. That said commissioners shall have the authority to direct the employment of the convicts of the state prison, in laboring upon said canal, in such manner as shall seem most advisable.

Sec. 10. That said commissioners enquire into the situation of the affairs of the Jeffersonville Ohio Canal Com-

pany, at their discretion, and that they report the things and acts they shall do under this act, to the next General Assembly.

Sec. 11. That the Governor transmit with as little delay as possible copies of this act to the Governor and each branch of the Legislature of the state of Ohio.

This act to take effect and be in force, from and after its passage.

[Acts Indiana, 1823, p. 78.]

XXV

AN ACT authorizing the appointment of Pilots at the falls of the river Ohio, in this state. Acts 1825, p. 51.

[APPROVED FEBRUARY 7, 1825.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That from and after the passage of this act, the governor of this state shall be authorized to appoint and commission skillful and experienced persons, not exceeding four in number, to act as pilots at the falls of the Ohio river in this state.

Sec. 2. Before any person, appointed and commissioned by virtue of this act, shall be authorized to act as a pilot, in conducting boats over the falls aforesaid, he shall execute a bond, payable to the state of Indiana, with security, to be approved by the clerk of the Clark county circuit court, in the penal sum of five thousand dollars, conditioned for the faithful performance of the duties of pilot as aforesaid; which bond shall be by such clerk filed in his office for the use of any person or persons who may conceive himself, herself or themselves injured by the unfaithfulness or neglect of any such pilot; and such person, upon suggesting any injury received in violation of the conditions of said bond, may in the name of the state, sue thereon; and said bond shall not be void on the first recovery, but shall stand and remain as security for any future defalcation, upon which a scire facias may be issued as upon other judgments similarly situated.

Sec. 3. Each pilot so appointed and commissioned, shall be entitled to demand and receive for each flat bottomed boat that he conducts over the falls, the sum of three dollars: Provided, That for family boats, and others not exceeding thirty feet in length, the pilots aforesaid shall not be entitled to demand and receive over two dollars for conducting the same over the falls.

Sec. 4. Every pilot that shall exact and receive for conducting a boat over the falls, a greater sum than he is entitled to by this act, shall be deemed guilty of extortion, and liable on conviction, to all the penalties thereof.

Sec. 5. Every pilot, who shall refuse without good cause, on tender being made to him of his lawful fees, to conduct any boat over the falls, shall forfeit and pay a fine of ten dollars, one-half to the informer, the other for the benefit of the Clark County Seminary.

Sec. 6. If any person shall act as pilot without being duly authorized and qualified, as by this act provided, he shall for each offense, forfeit and pay a fine of twenty dollars, to be recovered before any justice of the peace where such offender may be prosecuted, one half of which shall go to the pilot informing of the offense for which the delinquent may be convicted, and the other half to the seminary of the county where he is convicted; and the getting on board of any boat at or near the head of the falls, and taking the direction of the same under the pretence of being a hand, a passenger, or other pretence whatever, shall be deemed prima facie evidence of the violation of this act, and it shall lie on such person to prove that he did not act as pilot to such boat, unless an authorized pilot be on board the same.

Sec. 7. Nothing in this act shall be so construed as to compel any owner, shipper or navigator of a boat descending the Ohio river, to employ or pay any pilot whatever; but all persons shall be considered at perfect liberty to navigate the falls at their own risk.

This act shall take effect and be in force from and after its publication.

[Acts Indiana, 1825, p. 51.]

XXVI

AN ACT explaining and regulating jurisdiction.

[APPROVED DECEMBER 28, 1829.]

Whereas, some doubts have been suggested, as to jurisdiction possessed by the several counties in this state, upon those water courses which are and have by law been declared navigable; to remove which doubts,

Be it enacted by the General Assembly of the State of Indiana, That in all cases where the division line, either between this state, and those of Ohio, Kentucky and Illinois, or Michigan Territory, or of any one or more counties within this state, shall be navigable streams or waters, or those declared so by law, the said several states and adjacent counties within this state, shall have, possess and exercise concurrent jurisdiction over the said navigable streams, for the enforcement of civil or criminal justice.

[Acts Indiana, 1829, p. 84.]

XXVII

A JOINT RESOLUTION relative to a certain act of the legislature of Virginia.

[APPROVED JANUARY 28, 1830.]

Be it resolved by the General Assembly of the state of Indiana, That it shall be the duty of the secretary of state, to have the eleventh section of the act of the commonwealth of Virginia, entitled "an act concerning the erection of the district of Kentucky, into an independent state," passed the 18th of December, 1789, attached to, and published with the laws of this session.

[Acts Indiana, 1829, c. 137, p. 180.]

APPENDIX.

The following is a copy of the seventh section of an act of the commonwealth of Virginia, entitled "an act concerning the erection of the District of Kentucky into an independent state.

[PASSED DECEMBER 18, 1789.]

[See Revised Laws of Virginia, 1st vol., page 59; see also "Jurisdiction," ante page 84, and Joint Resolutions, ante page 180.]

Sec. 7. That the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies therein, shall be free and common to the citizens of the United States; and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

The following is a copy of the eleventh section:

Sec. 11. This act shall be transmitted by the executive, to the representatives of this commonwealth in congress, who are hereby instructed to use their endeavours to obtain from congress, a speedy act to the effect above specified.

[Acts Indiana, 1830, p. 182.]

XXVIII

AN ACT organizing circuit courts, and defining their powers and duties.

[APPROVED JANUARY 24, 1831.]

Sec. 14. That in all cases where the division line, either between this state and the states of Ohio, Kentucky and Illinois, or the Michigan territory, or of any one or more counties, within this state, shall be navigable streams or waters, or those declared so by law, the said several states, and adjacent counties within this state, shall have, possess and exercise, concurrent jurisdiction over the said navigable streams, for the enforcement of civil or criminal justice.

[R. S. 1831, p. 142.]

XXIX

CHAPTER I, SECTION 2, R. S. IND. 1843.

The state of Indiana possesses jurisdiction and sovereignty, coextensive with the boundaries as declared in the preceding section, and has concurrent jurisdiction in civil and criminal cases, with the state of Kentucky on the Ohio river, and with the state of Illinois on the river Wabash, so far as said rivers form the common boundary between this state and the said states respectively. (Ind. R. S. 1843, p. 66.)

XXX

INDIANA CONSTITUTION, 1851. ARTICLE XIV, SECTION 2.

The state of Indiana shall possess jurisdiction and sovereignty coextensive with the boundaries declared in the preceding section; and shall have concurrent jurisdiction, in civil and criminal cases, with the state of Kentucky, on the Ohio river, and with the state of Illinois, on the Wabash river, so far as said rivers form the common boundary between this state and said states respectively.

XXXI

SECTIONS 93 AND 96 OF INDIANA REVISED STATUTES OF 1852.

Section 93. That the proper courts of the several counties in this state bordering on the Ohio river, and on the Wabash river as far up as said river forms the boundary line between this state and the state of Illinois, shall have jurisdiction of all offenses committed against the penal laws of this state on said rivers, opposite to said counties, respectively. Whenever any violation of the penal laws of this state shall be committed on either of the above-named rivers, opposite to the line dividing any two counties bordering thereon, or so near to said line that it may

be doubtful on which side of said line the offense was committed, the proper courts of either of the counties adjoining said line may take cognizance of said offense.

Section 96. Whenever any part of the boundary of any county is the Ohio river, all process issuing to the officers of such county may be served on the said river, so far as the same is the boundary of this state.

1 R. S. Ind., 1852, p. 197;
1 R. S. Ind., 1876, p. 222;
R. S. Ind., 1881, §4207;
R. S. Ind., 1901, §5544.

XXXII

STATE OF INDIANA.

CERTIFICATE.

I, Daniel E. Storms, Secretary of State of the State of Indiana, do hereby certify that all of the copies of acts of the legislature of Indiana printed in the foregoing pamphlet which purport to be acts of the legislature of Indiana, are full, true and complete copies of the original acts in my office and custody as Secretary of State of Indiana; and that the separate sections of acts of the Indiana legislature therein printed are full, true and complete copies of the original sections of the acts of which they respectively purport to be a part.

Witness my hand as Secretary of State of Indiana, and the Great Seal of the State, this fifth day of December, A. D. 1903.

Daniel E. Storms

Secretary of State of Indiana.